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VANUATU: LANDS IN A SEA OF ISLANDS

Susan Elizabeth Farran

PhD

2013

VANUATU: LANDS IN A SEA OF ISLANDS

Susan Elizabeth Farran

An appraisal submitted in partial fulfilment of the
requirements of the University of Northumbria at
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ABSTRACT

This collection of eight single-authored papers published between 2008 and 2012, provides detailed and critical insight into land issues in the Pacific island country of the Republic of Vanuatu.

Developed largely from conference papers delivered to international audiences, these publications make a novel and significant contribution to the prior knowledge base in a number of ways.

Firstly, the research behind these papers has combined physical proximity to the subject matter – through being based in Vanuatu for several years, with access to a range of legal and other materials as well as personal insights, with a broader intellectual expertise in the law of property and trusts as introduced into the region. A combination of doctrinal and empirical research has made it possible to give a specifically focussed law in context and law in practice perspective, while not losing sight of the inter-relationship of law and society. In this way the existing knowledge base founded on anthropological and ethnological studies has been given a further and contemporary, legal dimension.

Secondly, the desire to reach a wider audience than the regional or local, has meant that these publications have engaged Vanuatu as a case-study with broader themes, sometimes starting from the local and exploring outwards and sometimes starting from the global and narrowing in on Vanuatu as a concluding focus. While recognising all that makes Vanuatu unique, the contribution that this collection makes is to bring this island study from the particular to the general, in from the margins or as part of a removed and rather isolated area of study, towards the mainstream.

Thirdly, these publications articulate land developments at a crucial moment. The first decade of the twenty-first century, has been a time of increased public awareness of land issues in Vanuatu and in the Pacific region more generally, and a time of increased donor intervention in land and law related activities. That this research and the related research that informs it, is integral to this process has been evidenced by cross referencing to some of the work and other indicators of esteem by aid donors, inter-state agencies and other academics.

Land remains a site of contestation in Vanuatu. The critical analysis of present issues, against the historical context of colonial rule and its subsequent influence; the introduction of foreign laws and institutions and the continuing importance of unwritten customary law, exposes many of the challenges that are encountered in trying to frame a way forward and engages with controversies surrounding land policy, land law and the management of this most fundamental resource.

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Acknowledgements

The publications in this collection span a number of years and final versions of published articles are the result of anonymous reviewers' comments, the enthusiasm and hard work of editors, the kindness of others in asking me to contribute to collections, the helpful insight of colleagues, the assistance of countless librarians across continents and the inspiration of Pacific islanders.

Declaration

I declare that the work submitted in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved by the relevant persons/committees at the time of the research and prior to publication.

Name: Susan Elizabeth Farran

Signature:

Date: 1/09/2013

INTRODUCTION

Overview

This thesis brings together publications spanning over a decade of research into land issues in Vanuatu and in particular the challenges which arise as a consequence of: the transition from colony to independent state, the legacy and retention of a plural legal system, and the competing agendas of development and the preservation of indigenous values and traditions.

Land is central to all of these. Competitive land acquisition between French and British settlers gave rise to political intervention by France and Britain;¹ reaction against colonial land grabbing informed the politics of independence;² initiatives to return land to the customary owners at independence led to the present confusion of laws;³ and pressures to derive greater economic benefit from land, for example by attracting inward investment and fostering development, give rise to continuing tensions. Land, as a signifier of place rather than as a market commodity, is also central to identity in the Pacific and closely linked to social organisation.⁴ Customary land tenure is the major form of land holding in a country which is seeking to engage in the international arena, and land is one of the most frequent sources of contestation. As shown in the publications in this collection, traditional forms of land-holding are subject to increasing pressure as a result of aid-for-trade initiatives,⁵ development agendas of the state, inter-state and non-state agencies and as a result of internal socio-economic imperatives.

As a relatively young, post-colonial independent state some of the conditions experienced by Vanuatu are shared by other countries with similar characteristics. For example, Vanuatu is listed as one of the world's Least Developed States (LDCs),⁶ and a Small Island State (SID).⁷ It is also a

¹ See R. Aldrich and J. Connell, *The Last Colonies*, (1998), and by the same authors *France's Overseas Frontier: Départements et Territoires D'Outre Mer*, (1992).

² See van Trease, H., *The Politics of Land in Vanuatu: from colony to independence* (1987).

³ See Articles 73 - 75 Constitution of the Republic of Vanuatu.

⁴ As James Leach has explained: 'Kinship is rooted in particular places; land underwrites the social relationships it nurtures. Those relationships manifest in persons, and in things, making these creations aspects of the place itself, drawn from and feeding back into a unique kind of emergent lifeworld. They are not those of property ownership but of ongoing mutual possession.' J. Leach, 'Twenty toa has no power now' (2011) 34 (2/3) *Pacific Studies* 295, 310.

⁵ This now includes WTO membership which was concluded in 2012.

⁶ There are currently 48 LDCs, 14 of which are in Asia and the Pacific. These include: Afghanistan, Bangladesh, Bhutan, Cambodia, Kiribati, Lao Peoples Democratic Republic, Myanmar, Nepal, Samoa, Solomon Islands, Timor-Leste, Tuvalu, Vanuatu, and Yemen. See further the Office of High

country of indigenous people and heavily dependent on aid donations from developed countries and inter-state agencies. This location of Vanuatu within a global community of nations is something to which I draw attention in Part One. The case-study is also representative of the challenges emergent nations face in a global economy. Like other LDCs, SIDs and members of the Alliance of Small Island States,⁸ Vanuatu is confronted by the need to attract inward investment, to build its economy, to meet its human rights obligations under international treaties and its own constitution, and to comply with the conditions and pre-requisites of aid-donors, investors and non-state actors. There are conflicts of interest surrounding the use, management and exploitation of natural resources throughout the Pacific, and in Vanuatu, land is the major natural resource. My publications locate land in Vanuatu against this background and present a contemporary picture of the lived reality of these challenges and dilemmas. The approach is therefore both law in context and law in application.

A number of themes run through these publications: colonialism and post-colonial legal legacies; the emergence of national sovereignty and indigenous self-governance; the influence of custom and customary law and the importance of land to identity and survival. Although the body of work presented here focusses on land, it is located against my own wider research into Pacific islands' laws, including property law, land law, human rights and family law,⁹ and a more general interest in comparative law and legal pluralism.¹⁰

The publications in this collection build on the work of historians, human geographers, anthropologists and ethnologists, and present a legal perspective which encompasses the country as a

Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLS).

⁷ The UN lists thirty-eight SIDS.

⁸ Recognised by the United Nations as a negotiating body, the [Alliance of Small Island States \(AOSIS\)](#) has a membership of forty states which includes UN and non-UN member states. Pacific members include: Cook Islands, Fiji, Federated States of Micronesia, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. American Samoa and Guam are observers.

⁹ See for example: *South Pacific Perspectives of Property Law* (2004) with D. Paterson; 'Sand, Fish and Sea: A Legal Reflection on Islands – From Orkney to Vanuatu' (2006) 21 (4) *International Journal of Coastal and Estuarine Law* 389-421; 'Land Rights and Gender Equality in the Pacific Region' (2005) 11 *Australian Property Law Journal* 131-140; 'Land in Vanuatu: Moving Forwards, Looking Backwards' (2002) II *Revue Juridique Polynésienne* 213-224, and 'South Pacific Land Law: Consideration of Some Regional Challenges, Cases and Developments' (2002) 32 *Victoria University of Wellington Law Review* Issue 4, 953-972.

¹⁰ See for example, 'Palm tree justice? The role of comparative law in the South Pacific', (2009) 58 *International and Comparative Law Quarterly* 181-195; 'Is Legal Pluralism an obstacle to human rights? Considerations from the South Pacific' (2006) 52 *Journal of Legal Pluralism and Unofficial Law* 77-105; and 'A Microcosm of Comparative Law: the Overlay of Customary, French and English Family Law in Present Day Vanuatu' (2004) 4 *Oxford U Comparative Law Forum* available at <http://ouclf.iuscomp.org/articles/farran.shtm.l>

whole rather than focussing on particular islands, people or groups. While there had been some thematic writing prior to the publication collected here, which was of relevance to land,¹¹ there was virtually no detailed engagement with legal materials to explore the relationship between people and land in a contemporary setting and very little specific legal academic comment in general. This was partly because access to such materials was difficult, so physical presence in the country and access to law reports and legislation was an advantage,¹² but also because in the period immediately after independence in 1980, there was a hiatus in land issues. It should also be noted that the Law School in Vanuatu was only established in 1996 which meant that there was no prior collection of legal materials at an academic institution there.¹³ An escalation in land alienation started to occur when restrictions on sub-divisions were lifted in the 1990s and again once agricultural leases of 30 years or less came to an end. I took up residence in Vanuatu, as a member of the Law School Staff at the University of the South Pacific, in 1999, so the timing of my research coincided with a number of factors which made it particular pertinent and my research was able to both contribute to and take advantage of a growing awareness of land issues through the 2000s.

As an academic I also had the advantage that I could present conference papers based on my research beyond the immediate region, notably in Australia and the UK,¹⁴ and include my publications in collections which placed land in Vanuatu alongside land issues in other jurisdictions. For example, Publication 5, is included in a collection of essays focussing on Land and Security primarily from an Australian perspective but against wider political and economic concerns about the security of property rights, and although it is the only paper in this collection focussing on a Pacific island study, it, along with those of other contributors, poses some ‘key questions for law and the future regulation of property rights’ and ‘the impact of deeper and wider social changes on the operation and development of various property doctrines.’¹⁵ Similarly, Publication 6 is included in a collection of papers the authors of which, as the editor Martin Dixon states in his introductory preface, ‘come from the four corners of the legal world—both common law and civilian—and a good portion of the

¹¹ For example, Jean-Marc Pierre ‘Vanuatu: New directions in Land Development Policies’ in Crocombe, R. and Meleisia, M. (eds.) *Land Issues in the Pacific* (1994), and Selwyn Arutangai ‘Vanuatu: Overcoming the colonial legacy’ in Crocombe, R. (ed.) *Land Tenure in the Pacific* (1987).

¹² This has been considerably improved since the establishment of the open access electronic data base PacLII (pacLii.org), but when I first visited the University of the South Pacific in 1996, there was virtually no academic legal comment focussing on law in the Pacific islands and even access to primary sources was limited.

¹³ The Law School had previously been in Fiji on the main campus of the University of the South Pacific (USP), and still has a presence there.

¹⁴ All except two of the papers collected here (Publications 1 and 4) were originally presented as conference papers.

¹⁵ L. Bennet Moses, B. Edgeworth and C. Sherry (eds), (2010) *Property and Security: Selected Essays*, Ashgate, v.

analysis is comparative in outlook'.¹⁶ Together these papers 'challenge our conception of what we mean by 'property' and ask whether our existing concepts are as transferable and durable as we would like to think they are'.¹⁷

Other publications in this collection have appeared in journals with an international readership and linked land issues in Vanuatu with broader themes, so that those not necessarily familiar with the Pacific have the opportunity to learn more about it, for example, the *Journal of Legal Pluralism and Unofficial Law*, the *International Journal of Law in Context*, while others have appeared in journals such as the *LAWASIA Journal* and *Victoria University of Wellington Law Review*, whose readers are probably more familiar with the Pacific region but are interested in acquiring a better understanding. Taken together this body of work represents a major contribution to knowledge about land in Vanuatu which is accessible to a diverse audience, through hard copy, electronically, via search engines and can be found in depositories in Vanuatu itself, notably at the Vanuatu Cultural Centre and at the USP library.

Impact

While measuring impact is difficult, this work together with other outputs has, in the first instance, underpinned and informed the teaching of property law to Pacific Islanders.¹⁸ Given that these students are themselves, or will be, land owners, and that many will take up posts in the public sector to redeem the scholarships that fund their studies, some are likely to find themselves in roles associated with land.¹⁹ Secondly, six of the publications included here are based on conference papers given to diverse audiences in the Northern and Southern hemispheres, thereby bringing to their attention my concerns about land in Vanuatu. Thirdly, there are those who have cited my work, or earlier versions of it, in policy papers, for example, Lunnay and Others, 'Vanuatu: Review of national land legislation, policy and land administration' (2007),²⁰ AusAid, 'Making Land Work'

¹⁶ M. Dixon (ed) (2009) *Modern Studies in Property Law* Vol 5, Hart, Oxford, p 1.

¹⁷ Dixon above p 2. This collection was reviewed by M. Walsh, *Kings Law Journal*, Vol. 21 (2), 417-424 who commented 'This volume, with its great breadth of work from academics around the world, is thought-provoking and, I have no doubt, will encourage others to engage in their own research in their favoured area. This volume stands as a testament to the outstanding scholarship of its contributors'.

¹⁸ While a full-time member of staff at the University of the South Pacific and as a visiting Adjunct Professor, most recently in 2012 to teach 'Contemporary Land Issues in the Pacific'.

¹⁹ For example, Steven Tahī who produced the summary of the National Land Summit in Vanuatu, is a former student, and others frequently appear as counsel before the local courts.

²⁰ http://www.ausaid.gov.au/Publications/Documents/vanuatu_land.pdf

Volume Two (2008);²¹ Cox and Others, ‘The Unfinished State: Drivers of Change in Vanuatu’, (2007);²² and the New Zealand Law Commission, Study Paper 17 (2006), *Converging Currents: Custom and Human Rights in the Pacific*.²³ There is also some cross reference to my work in academic literature, for example, Haccius, ‘The Interaction of Modern and Custom Land Tenure Systems in Vanuatu’, *State Society and Governance in Melanesia*, Discussion Paper 1 (2011); Nagarajan and Parashar, ‘Space and Law, Gender and Land: Using CEDAW to Regulate for Women’s Rights to Land in Vanuatu’ (2013) 24 (1) *Law and Critique* 87-105. A full list can be found in the Appendix.

As I indicate in my conclusion to this collection many of my concerns have not been addressed and it may well be that while I have been able to offer a more critical and objective analysis of land policy and present and proposed legal frameworks, being unconstrained by political, diplomatic or aid considerations, my views are not necessarily ones that are popular. What I hope is that these views inform action groups advocating alternative approaches to land management and law reform, for example AID/WATCH,²⁴ and MILDA (Melanesian Indigenous Land Defence Alliance).²⁵ I would also like to think that my research itself provides background to new forms of land advocacy, for example, the Vanuatu representation to the UN Expert Group Meeting, ‘Good practices in realizing women’s rights to productive resources, with a focus on land’ held in Geneva, Switzerland 25-27 June 2012, makes reference to works in which I have either been cited or which I have myself reviewed,²⁶ and that it inspires a growing body of critical scholarship about land, development, participation and rights.²⁷

²¹ Vol 2. *Reconciling Customary Ownership and Development*. Notably J. Fingleton, A. Naupa, and C. Ballard, ‘Village Land Trusts in Vanuatu: one common basket’
http://www.aisaid.gov.au/publications/documents/mlw_volumetwo_casestudy_2.pdf

²² http://www.aisaid.gov.au/publications/documents/vanuatu_change.pdf

²³ New Zealand Law Commission available at:
http://www.lawcom.govt.nz/sites/default/files/publications/2006/10/Publication_120_340_SP17.pdf.

²⁴ See L. Daley, ‘Hijacking Development Futures: “Land Development” and reform in Vanuatu’,
http://www.aidwatch.org.au/sites/aidwatch.org.au/files/Lara%20Daley_0.pdf (Accessed 14/02/2013),
 and T. Anderson and G. Lee, (2010) ‘In Defence of Melanesian Customary Land’ AID/WATCH.

²⁵ See MILDA <http://mildamelanesia.org/about>.

²⁶ ‘Making change happen: How and where to realize women’s land rights in Vanuatu’. The report was written and presented by Anna Naupa, with whom I have met to discuss land issues on many occasions and who is familiar with my work. <http://www.unwomen.org/wp-content/uploads/2012/07/EP-Making-change-happen.pdf>

²⁷ See for example, work by Siobhan McConnell, Claire Slatter and Jane Kelsey.

Structure

The collection is divided into three parts in which the various publications are drawn together thematically. Part One: The Colonial Past: New Hebrides to Vanuatu, which comprises two publications, locates the contemporary in its historical context. The first publication (Publication 1) outlines the pre-independence history of Vanuatu, placing this emerging island state within the international context, and illustrates the competitive rivalry for newly discovered lands among imperial powers, notably here, France and Great Britain, and the extraordinary consequence of this in the establishment of a condominium government. Although intended as a background article which traces the emergence of the independent state of the Republic of Vanuatu and its present international status, an understanding of the historical context is essential for grasping more recent and contemporary issues and informs a number of the arguments raised in the subsequent publications. It is also a mark of recognition of my area of expertise that I was approached and invited to write this encyclopaedia entry by Kluwer International. Subject to plural laws prior to independence, the next publication (Publication 2) develops a critical analysis of the colonial legacy, in particular the plural legal system which governs land and the practical and conceptual difficulties that this causes.

Part Two: The Challenges of Development and its Consequences, brings together four published works in which the pressures of development and aid agendas are examined. The first, (Publication 3), considers law as an agent for change within the context of external and internal pressures. While pre-independence colonialism was the focus of the first part, this part raises questions about post-independence colonialism in the form of donor intervention, the capacity of small states to exercise sovereignty over the pace and form of development, and the potential negative consequences of uncontrolled land exploitation. One of these is the infringement of the fundamental rights of indigenous people, which is considered in Publication 4. Related to the theme of rapid change and inequitable distribution of benefits is the potential for wider repercussions of land conflicts triggering civil unrest and social disruption, which are examined in Publication 5. The second and third publications in this part (Publications 4 and 5) focus on the role of law as an agent of change, in particular in the context of transition from underdeveloped colony to developed or developing nation-state. The final entry in this part, Publication 6, considers why the law relating to land is problematic and attributes this in part to misplaced transplanted thinking which underpins common law understandings of property.

The entries in Part Two are very much focussed on the identification of problems, some of which can be traced back to pre-independence, but many of which are more modern in origin. Together these publications present a fairly pessimistic picture of land and law. Part Three: Using Land, Using

Law: Change and Tradition, considers the resilience and adaptability of customs, customary laws and indigenous people by focussing on two categories of case studies. The first is case-law – the reported decisions of courts, the second is island case-studies undertaken by field workers on two islands of the archipelago. Both entries take a law in context approach but the sources being examined are very different. In the first article in this part (Publication 7) the focus is on the evidence being presented in court to support land claims. The second (Publication 8), incorporates statistical data derived from formal records of land leases and field studies based on data and interviews. Together, but in different ways, these local case-studies suggest that there is some creative engagement with the existing legal framework which indicates that not only does customary land tenure continue to be a dominant source of land regulation but also that Pacific islanders in Vanuatu are become increasingly adept at using the prevailing plural legal system to their advantage. In this way customary law continues to survive through a process of adoption and adaptability.²⁸

The thesis concludes by taking into account current land issues noted during a short visit in 2012, and reflecting on the past decade of land and development and the role and efficacy of laws in coping with the challenges which confront Vanuatu.

Methodology

The research which informs these publications is largely doctrinal, using primary law sources: legislation and case-law drawn from hard copy held in the Emalus library at the University of the South Pacific, and electronically on PacLII, and secondary law materials and other published resources held in hard copy at the Emalus library, obtained through inter-library loan and accessed electronically through data-bases such as Hein online, AustLii, and dedicated publisher e-resources sites. One of the advantages that I have had from being physically proximate to my research sources for a number of years, is that I have had access to material which, while it may be in the public domain has not been widely disseminated, (for example, because of its localised nature, such as press reports and land survey maps, or because there are few extant copies, or because it is out of print). I have also been able to access materials in draft form or in working papers through personal contacts, and even when outside the region, where I have needed clarification on matters or information which is not easily accessible I have been able to correspond with personal contacts.

²⁸ I have suggested elsewhere that this gives rise to a new hybridity of law. See ‘Pacific Punch: tropical flavours of mixedness in the island republic of Vanuatu’ Mixed Jurisdictions East-West, Society of Mixed Jurisdictions, Valletta, Malta, May14-16, 2012, available at <http://ssrn.com/author=1935328>

Consequently I have been in the fortunate position of being able to draw together widely available material and more localised, less widely available material in order to develop a deeper legal understanding of the land issues which are central to this collection.

Empirical research has also been used to inform my research. This is referred to in particular in Publications 6 and 8. Some of this was carried out by myself while in Vanuatu and some has been subsequently carried out by field researches of the World Bank Justis Blong Evriwan project (see below). I undertook initial empirical research in 2000 (while at the University of the South Pacific based in Vanuatu). This was hard copy statistical research involving the examination of approximately 1070 individual files for all registered leases for the island of Efate, excluding the urban area of Port Vila – the capital, held in the Land Registry office. The aim of this research – in which I was assisted by a team of students, was to tabulate the extent of land leasing on the island. Details of acreage, length of lease, premiums paid, and the identity of lessor and lessee (where available) were recorded and totals were calculated. The research was carried out over a period of three months. Although the records were in some instances incomplete, missing or duplicated, this initial data provided hard evidence of lease activity in one limited location and informed public presentations and subsequent discussion. A full report was sent to the then Minister of Lands.²⁹

A summary of this research informed subsequent early discussions with representatives from Jastis Blong Evriwan (Justice for the Poor (J4P): a World Bank funded project,³⁰ and led to the formulation of a project by J4P to undertake a much more extensive data search of electronic records of leases as well as two field studies. I was involved in this project – which had several phases, first as a desk consultant and later as a desk researcher. The reports of the statistical research, which encompassed the whole of Vanuatu in order to produce a national leasing profile, are now publically available.³¹

²⁹ (2002) *Report on Land Leases and the Use and Management of land in the island of Efate Vanuatu* 210 pp. The research was also used to inform shorter papers such as (2002) *Myth or Reality: Case Study of Land Tenure in Efate*, which was presented at a Symposium on South Pacific Land Tenure in Fiji organised by the FAO/USP/RICS Foundation (accessible via <http://maya.usp.ac.fj/index.php?id=6181>); and ‘Ministerial Leases in Vanuatu: A Working Paper’ (2003) 9 *Journal of South Pacific Law* available at <http://www.vanuatu.usp.ac.fj/jspl>. The FAO/USP/RICS paper was subsequently referred to by the Pacific Islands Forum Secretariat Forum Economic Ministers Meeting, 3-4 July 2002 in their Session 3 Paper ‘Land Leases’ PIFS (02) FEMV.06, available at: <http://www.forumsec.org.fj/resources/uploads/attachments/documents/FEMM%202002%20Land%20Issues.pdf>.

³⁰ The World Bank, Justice for the Poor, <http://web.worldbank.org/>

³¹ See *Summary of Land Leasing Data in Vanuatu*; Justice for the Poor in Vanuatu, May 2012; Nixon, R., Otto, L. and Porter, R., *Wan Sip, Plante Kapten: Leasing on Tanna Island, Vanuatu*, J4P Research Report, May 2012; Scott, S., Stefanova, M., Naupa, A. and Vurobarav, K., *Vanuatu National Leasing Profile: A Preliminary Analysis* u, J4P Briefing Note, May 2012; *Wan Lis, Fulap Stori: Leasing on Epi Island, Vanuatu* | *Bislama Version of Executive Summary* Raewyn Porter and

J4P also undertook two field studies, one on the island of Epi and one on the island of Tanna, combining statistical data in respect of leases with on-site interviews to ascertain attitudes and concerns towards leases. This later research informs publications in Part Three.

A broader contextual understanding of Vanuatu was gained from personal observation and conversations with local people while living in Vanuatu (1999-2004) and on subsequent visits first as a Visiting Lecturer and more recently as an Adjunct Professor at the University of the South Pacific (2012, 2011, 2007 and 2005).

Literature

While there is other published work about land in Vanuatu,³² quite a lot of contemporary legal writing tends to be undertaken for aid-related projects and similar purposes. Consequently its scope and aim has to be treated with some caution. Unconstrained by a political or funding agenda I have been free to write critically and publish widely, and while I am conscious that I look at land and Vanuatu through a non-indigenous lens I have felt able to express views which might sometimes be contentious.

Over the period of this research I have drawn on a number of different sources which I indicate in the various papers. These include publications dealing with the pre-independence history of the islands, and post-colonial commentaries such as that of Lindstrom and White (eds) *Chiefs Today: Traditional Pacific Leadership and the Postcolonial State* (1997), which provides useful insights into Melanesian social structure and traditional power bases, while van Trease's work, *The Politics of Land in Vanuatu: from colony to independence* (1987) was significant in informing my understanding of the role of land acquisition and resistance to the political relationship between the metropolitan powers, early settlement by outsiders and the movement towards independence. Other edited collections of essays on land in the Pacific such as the work of Crocombe and Larmour have also informed my understanding of the background to present land issues as did Ward and Kingdon's publication, *Land, Custom and Practice in the Pacific* (1995). My own work provides a more current perspective of land and approaches the topic from a number of different angles in order to locate it within a wider national and international context.

Rod Nixon, J4P Research Report, September 2010

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:21172707~menuPK:3282963~pagePK:210058~piPK:210062~theSitePK:3282787,00.html#Vanuatu>.

³² Particularly in collections edited by the late Ron Crocombe.

In this way I complement a number of more general texts published during the course of my research, which also include material relevant to Vanuatu, for example: Corrin and Patterson, *South Pacific Legal Systems* (first edition published in 1999); Corrin, *Civil Procedure and Courts in the South Pacific* (2004) and a co-authored text by myself and Donald Patterson, *South Pacific Property Law* (2004).³³

There is considerable literature addressing the theoretical debates that underpin my published work, for example, texts dealing with legal pluralism, those addressing customary law, the challenges confronting customary and plural legal systems, the problems of legal transplants and the difficulties of law reform. These are referred to in the papers themselves and/or in the introduction to each part. While my research has been informed by this body of literature, my own contribution has focused on law in practice to discern the pressures that must be accounted for to achieve an adequate understanding of disputes over land and to identify the ways in which legal resources of various context dependent types are now being actively used to resolve such disputes.

In order to understand custom and customary law I have primarily relied on case-law and a limited number of academic accounts.³⁴ These have been supplemented by detailed and specific ethnological studies.³⁵ Many of these provide valuable insights into particularly customs, people or places in Vanuatu, but are necessarily limited in their legal scope owing to the mode of research and focus. The law, however, whether customary or introduced law, as Sally Engle Merry has stated in a different context, has ‘peculiar power to effect socio-cultural transformation by creating and redefining social meanings’.³⁶ My research has brought together these two dimensions –socio-cultural and law, focussing on land in a particular time and place to explore this redefining and transformation as seen through a legal lens. I do not profess to have contributed anything to anthropology, nevertheless researching and writing on land in Vanuatu has brought me into contact with a growing number of contemporary anthropologists so that today I am involved in several organisations and networks fostering and sharing research in the Pacific.³⁷ In this way I continue to contribute to interdisciplinary research in the region.³⁸

³³ This later, although not included in this collection of publications, has been cited in a wide range of sources.

³⁴ At the time of writing most of this work, M. Forsyth’s seminal work, *A Bird that flies with Two Wings: Kastam and State Justice Systems in Vanuatu* ANU e-Press, 2009, was not available.

³⁵ See for example, work by Lamont Lindstrom, Lissant Bolton, Margaret Rodman, Margaret Jolly, Knut Rio; Jean Guiart, Hubert Benoist and Joel Bonnemaïson.

³⁶ S. E Merry, *Colonizing Hawaii: the Cultural Power of Law*, Princeton University Press, (2000) 26.

³⁷ I am for example, an Associate of the Centre for Pacific Studies at the University of St Andrews, through which I have also been appointed as a collaborating scientist in an EU funded Framework Seven Consortium entitled ECOPAS (European Consortium for Pacific Studies); I have regularly contributed papers at the European Society of Oceanists (Esfo) bi-annual conference, co-ordinating

As is indicated in the publications themselves my work has been informed by other publications relating to aid policy which have an impact on land, for example, AUSAID's: *Making Land Work* (2008); and *Pacific 2020: Challenges, and Opportunities for Growth* (2006) and the Pacific Island Forum Secretariat's 'Customary Land Management and Conflict Minimisation – Guiding Principles and Implementation Framework for Improving Access to Customary Land and Maintaining Social Harmony in the Pacific' (2008), as well as national government statements. As I have indicated above and in the Appendix, my research and publications have also been cited in a number of policy documents.

Advancement of the field of study

Against this context of existing published work, the work submitted here advances the body of knowledge in this area in two ways. First, drawing on a range of multi-disciplinary and often scattered resources it presents an evolving and contemporary legal perspective specifically focussed on land. The relevance of this focus is evidenced not only by the National Land Summit of 2006 which in part built on awareness triggered by my original research on the extent of leases in 2001 and subsequent public conferences at the University of the South Pacific at which this was presented, but also by the subsequent expansion of aid-funded intervention directed at land reform, and reference therein to some of my work.³⁹

Secondly, by using Vanuatu as a case-study of land, law and development issues, my work has brought the island out of the Pacific and into the international domain through publication in range of outputs aimed at reaching an audience beyond the immediate region (as indicated above), thereby expanding the knowledge-resource base for readers, researchers and policy makers. As a Pacific case-study, Vanuatu is worthy of study in its own right, but the value of the research goes further,

and chairing panels in 2008 (Verona) and 2010 (St Andrews); and in 2013 presented a paper at the American Association for Social Anthropology in Oceania (ASAO).

³⁸ For example, the final paper in this collection is one of eleven brought together in a special 'Land and Law' issue of *Pacific Studies* in 2011, which I edited, as a result of chairing and co-ordinating a panel session at Esfo 2010.

³⁹ See for example, J. Fingleton, A. Naupa, and C. Ballard, 'Village Land Trusts in Vanuatu: One common basket' in *Reconciling Customary Ownership and Development*, Volume 2 AusAID, available at:

http://www.usaid.gov.au/Publications/Documents/MLW_VolumeTwo_CaseStudy_2.pdf; and M. Stefanova, R. Porter, and R. Nixon, 'Towards More Equitable Land Governance in Vanuatu: Ensuring Fair Land Dealings for Customary Groups' Discussion Note 70321, 2012, Justice for the Poor, World Bank, available at: http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2012/06/22/000356161_20120622021528/Rendered/PDF/703210ESW0P1170iscussion0Note0Final.pdf.

because as a microcosm reflecting many issues which are relevant beyond its borders, the topics considered here are encountered elsewhere in the world so that this collection of published work not only marks an important and novel contribution to knowledge and understanding about Vanuatu but contributes a practical example to the wider debate on matters such as human rights; globalisation versus state autonomy; land and development; managing plural legal systems; giving effect and respect to the rights and cultures of indigenous people; and ensuring sustainable futures for those living on small islands.

PART ONE

THE COLONIAL PAST: NEW HEBRIDES TO VANUATU

1. ‘Vanuatu (New Hebrides)’, (2012) Max Planck Encyclopedia of Public International Law, Oxford University Press, www.mpil.com
2. Fragmenting the Land and the Laws that Govern It’, (2008) 58 *Journal of Legal Pluralism and Unofficial Law* 93-113

Introduction

The first of the two articles in this part locates the focus of this research – Vanuatu, within the international and public law arena by tracing its early colonial history and pre-independence status and the significance of this colonial past on its present legal system. This article (Publication 1), an encyclopaedia entry written for a general readership as a point of reference, locates what is now the Republic of Vanuatu, but was formerly the New Hebrides (Nouvelle Hebrides), within the international community though the use of italicised terms,⁴⁰ demonstrating that although in many ways unique – particularly the Anglo-French Condominium rule, the characteristics and experience of pre-independence Vanuatu were shared by many other countries in a period of imperial dominance.

Like many other islands in the Pacific, the archipelago came to the attention of the West through the competitive voyages of discovery by mariners such as Quiros, de Bourgainville,⁴¹ Cook, Pérouse and d’Entrecasteaux.⁴² Rivalry between voyaging mariners was only the beginning of competitive imperialism in the Pacific, particularly Anglo-French rivalry, which shifted from scientific exploration to the protection of missionary spheres of influence, protection of settlers and rival trade interests. The New Hebrides was caught in the middle geographically and politically.⁴³

⁴⁰ These were determined by the publisher in order to create links between this entry and others in the series.

⁴¹ Quiros and Bourgainville had mapped some of the islands of the New Hebrides before Cook. See G. Price, (ed.) (1969) *The Explorations of Captain James Cook in the Pacific*, Angus and Robertson Ltd., Sydney.

⁴² Claims of European ‘discovery’ have long been refuted by Pacific scholars pointing out the much earlier voyages of discovery by Polynesians, Melanesians and Micronesians.

⁴³ New Caledonia to the West was French (and remains so), Fiji to the East was British.

The decolonisation of the New Hebrides and the movement towards independence was also part of an international phenomenon which had started earlier in Africa and Asia and then spread to the Pacific. The New Hebrides exemplified differences of approach to decolonisation by the imperial powers especially between Britain – which was prepared to give effect to the UN resolution of independence to former colonies or self-government in free association with the former metropolitan power, and France, which was – and remains – much more reluctant to let go of its overseas territories.⁴⁴

Although the significance of independence in this article is articulated primarily from the perspective of public international law, the distinction between jurisprudential theories of sovereignty and the practical expression of that sovereignty persist as a theme in this collection. Emerging as an independent state Vanuatu joined the family of nations and the international community, becoming incorporated into the classification mechanisms and procedures of the United Nations and other non-state bodies,⁴⁵ as well as a member of various organisations and affiliations.⁴⁶ Today it is possible to view Vanuatu through its signatory status to various treaties, its ranking on the UN Human Development Index,⁴⁷ its achievement of Millennium Development Goals and the reports which are filed on its compliance with its treaty obligations. The arena of public international law, therefore, reflects one of the aspects of globalisation which impact on small states such as Vanuatu, and this international context provides a background to the publications which follow.

The second article in this part (Publication 2), considers the consequences of the imperial past, in particularly the legacy of laws and the present state of legal pluralism that prevails. There is a strong link between the colonial past and the post-independence legal system but this also has to be understood in the context of theories of legal pluralism with which readers of the journal in which this article was published would be familiar.⁴⁸

⁴⁴ P. de Deckker, 'Decolonisation Processes in the South Pacific Islands: A Comparative Analysis Between Metropolitan Powers' (1996) 26 *VUWLR* 355. See also J. Springhall, *Decolonization since 1945: The Collapse of European Overseas Empires*, 2001, Palgrave MacMillan, Basingstoke, pp 186-202.

⁴⁵ As indicated in the introduction to this collection, Vanuatu is for example, a Small Island Developing State (SID) and a Least Developed Country (LDC).

⁴⁶ For example, Vanuatu is a member of the Alliance of Small Island States (AOSIS).

⁴⁷ In 2011 it was 125th out of 187 on the UN HDI ranking, and has dropped to 124 in the 2013 report see *Human Development Reports* <http://hdr.undp.org/en/statistics/>

⁴⁸ For example, J. Griffiths' definition in, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law*, 1. Although often associated with former colonies, legal pluralism remains of contemporary relevance in many parts of the world, see B. Tamanaha, 'Understanding legal pluralism: past to present, local to global' (2008) 30 *Sydney Law Review* 375.

This article examines the practical application and impact of Vanuatu's plural legal system in the context of land. The article explores the many pluralities which are at work here. This includes consideration of different relationships with land and the different rights and obligations that these give rise to, sources of law and legal process including dispute resolution, the different roles adjudicators play within that system and outside it, and the diverse forms of customary land tenure that co-exist. Much of the research here is doctrinal, looking at legislation and case-law, in order to demonstrate the plurality of laws and processes which apply, but these sources, especially the case-law is analysed to provide insight into the non-doctrinal: custom and customary laws and processes, including the roles of customary leaders: chiefs. A case-based approach to trying to understand customary law was adopted in preference to a theoretical one because ascertaining what is or is not customary law cannot be achieved from a merely theoretical perspective. Similarly ethnological or anthropological studies, while illuminating of particular societies or people within these, may lack sufficient breadth or legal focus to present a national overview.

Rather than engage in the debate as to when a custom or practice may amount to a customary law, which is particularly difficult in Vanuatu where customs are not homogenous, a presumption was made that where customary land tenure claims are made before a court of law they are based on customary law. Through the case law, therefore, custom, or at least a version of it, is made accessible.⁴⁹ This leads to considerations of interpretation, adaptation and communication of the unwritten in a legal forum. In exploring how evidence was presented this article highlights the role of legal process as a catalyst for change in customary systems. The adaptation of customary law through being presented as evidence in disputed land claims is associated with changing land use, which itself is a cause of many disputes. Changing land use is linked to development and the article concludes with some reflections on the relationship between legal pluralism and development.

These two themes, the colonial legacy and legal pluralism, continue to be referred to in the publications that follow, emphasising the present relevance of a colonial past and the particular challenges and opportunities which are presented by the complex inter-relationship of formal and customary laws, especially in respect of land. A focus on the colonial past is also retained to underline the potential influence of a neo-colonial present which itself has been partially triggered by the dismantling of the British Empire, the reduction of Britain as a sphere of influence in the Pacific,⁵⁰ and the competitive growth of other spheres of influence in the region. These latter are

⁴⁹ The importance of this is indicated in later publications to rebut the claim made by some opponents of customary land tenure that it is obscure and inaccessible and therefore an obstacle to development

⁵⁰ The office of the British High Commissioner in Vanuatu, for example, closed while I was there.

closely linked to external and internal drivers for change, integral to which is land development, a key theme in the second part of this collection.

Publication 1

Vanuatu (New Hebrides)’, (2012) Max Planck Encyclopaedia of Public International Law, Oxford University Press, www.mpil.com

New Hebrides (Vanuatu)

Sue Farran

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A. Historical Overview

- 1 Originally discovered in 1606, the → *islands* which became known as the New Hebrides, and today are the Republic of Vanuatu, were named by the English Captain James Cook in 1774. An increasing number of traders visited the islands after 1840 and French Catholic and English Presbyterian missionaries started to arrive in the same period. The gradual increase in European settlement by planters and colonists from the 1860s onwards resulted in growing competition for the acquisition of land from indigenous owners by rival companies, which in turn led to requests from settlers for → *annexation*, naval support, and, at times, protection. Although France had annexed other islands in the South Pacific—the Marquesas Islands in 1842; New Caledonia in 1853—and declared a protectorate over Tahiti in 1842 (→ *Protectorates and Protected States*), it expressed no interest in annexing the New Hebrides. Similar reluctance was expressed by Great Britain, which had acquired Fiji as a crown colony in 1874 and established a protectorate over the Solomon Islands in 1893. Indeed in 1878 an Anglo-French exchange of notes (Exchange of Notes: Arrangement between Great Britain and France, Respecting the Independence of the New Hebrides Group (signed 18 January and 20 February 1878) (1878) Pacific Islands Treaty Series 1) suggested that neither country proposed to interfere with the independence of the islands. However, as a result of increasing internal violence, competitive land acquisition, agitation from the Australian colonies, and mutual Anglo-French suspicion as regarded each other's intentions in the region, the two countries agreed the Convention between Great Britain and France Respecting Abrogation of the Declaration of the 19th June, 1847, relative to the Islands to the Leeward of Tahiti, and for the Protection of Life and Property in the New Hebrides ('Convention of 1887'), in which they proposed to establish a joint naval commission, charged with the duty of maintaining and protecting the lives and property of British subjects and French citizens in the New Hebrides. The Joint Naval Commission came into effect by way of the Declaration between Britain and France for the Constitution of a Joint Naval Commission for the Protection of Life and Property in the New Hebrides ((signed 26 January 1888)). Except in emergencies the naval representatives of the two powers had to act jointly. However, the Joint Naval Commission soon proved inadequate to meet the needs of the settler communities. In 1902 the two countries appointed separate Resident Commissioners. In 1904, the two powers made the Declaration between France and Great Britain concerning Siam, Madagascar and the New Hebrides ((signed 8 April 1904) 195 CTS 214) indicating an intention to formalize the shared government of the New Hebrides, and in 1906 Britain and France agreed the Convention between Great Britain and France concerning the New Hebrides ('Convention of 1906') which confirmed the Protocol between Great Britain and France Respecting the New Hebrides ('Protocol of 1906') This established a sphere of joint influence in the New Hebrides, under which France and Britain would have parallel jurisdiction over their own subjects. However neither of the two powers could exercise separate power over the whole group of islands. The Protocol of 1906, which was made effective in 1907 (New Hebrides Order in Council of 2 November 1907), replaced the Convention of 1887, retaining only the provisions for the Joint Naval Commission which remained in force. Its stated purpose was 'to secure the exercise of their [the governments of Britain and France] paramount rights in the New Hebrides' (Preamble), or, as stated in the French version 'en vue d'assurer l'exercice de leurs droits de souveraineté'. The French High Commissioner was the Governor of New Caledonia—and was also Commissioner-General of France in the Pacific Ocean—and the British one was the High Commissioner for the Western Pacific—based in Fiji until 1952 and then in Solomon Islands. For all practical purposes they were represented by the Resident Commissioners. Neither the Protocol of 1906 nor the Convention of 1906 that brought it into effect, made any reference to international law or to any procedures to be followed in negotiating or entering into international agreements in respect of the New Hebrides. Nor was the term → *condominium* used by the governments. There was no joint dominium over the land and joint rule was limited to the administration of a joint court, to the making of joint-regulations for the order and → *good governance* of the islands, and to certain public services to be undertaken in common. The term condominium appears to have been used primarily for administrative purposes in those areas where the two powers were required to co-operate, notably with reference to court personnel (see for example, *Tomarker v MacKell (Judgment)* Tribunal Mixte des Nouvelles Hébrides [New

Hebrides Mixed Tribunal] (18 April 1911) (1911) Décisions du Tribunal Mixte des Nouvelles Hébrides 1); and on official documents, such as the publication of joint regulations in the official gazette. Internationally, an explanatory reference to the Anglo-French Condominium can be found in the Exchange of Notes Constituting an Agreement Deleting the New Hebrides from the Annex of the Exchange of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Turkey for the Abolition of Visas ((signed 29 May and 11 June 1963, entered into force 11 June 1963) 482 UNTS 384).

- 2 Under pressure, the Anglo-French system of administration in the New Hebrides was amended in 1914 by the Protocol Respecting the New Hebrides ('Protocol of 1914'). This was not ratified until 1922 owing to the intervention and disruption of World War I (New Hebrides Order in Council (20 June 1922) 1922 Statutory Rules and Orders 1922/717 [United Kingdom]). Under the Protocol of 1914 the two powers continued to exercise separate jurisdiction over their own subjects, citizens, and optants. For British subjects and those foreigners who chose to come under British law, the laws which applied were British Acts of Parliament and subsidiary legislation which were stated to apply to overseas territories (see also → *Overseas Territories, Australia, France, Netherlands, New Zealand, United Kingdom, United States of America*); British Acts of Parliament of general application passed before 1 January 1976; English rules of common law and equity which applied except to the extent that they were inappropriate to the circumstances of the country; and Queen's Regulations made by the British High Commissioner of the Western Pacific and by the British Resident Commissioner in the New Hebrides. French subjects and optants were governed by French Acts of Parliament and subsidiary legislation which were stated to apply to overseas territories; French Acts of Parliament and subsidiary legislation which were applied to the New Hebrides by the French High Commissioner of the Pacific, stationed in New Caledonia; and Regulations made by the French High Commissioner of the Pacific.
- 3 Each imperial power had separate police forces which could, in emergencies, work together. Joint services were limited to specific areas such as posts and telecommunications, public works, the joint court and lower courts—although there was a choice of laws within these—joint native prisons, and joint public health. There was one set of postage stamps, issued in conformity with the Treaty concerning the Formation of a General Postal Union, with Detailed Regulations, and Final Protocol of 3 May 1875 ((signed 9 October 1874, entered into force 1 July 1875) 147 CTS 136), but both English and French currency was legal tender. In concert the joint powers passed a number of joint local regulations. In most cases these were directed primarily at controlling natives or relations between natives and non-natives. Natives were unable to acquire the status of subject or citizen of either of the two imperial powers. Native land rights were however recognized indirectly through the provision of dispute settlement mechanisms, acknowledging thereby that the New Hebrides was not *terra nullius* and that the two powers did not have proprietorship, either jointly or severally, over all the land in the group. While each imperial power could continue to legislate separately for its own subjects and optants, any amendments to the Protocol of 1914 had to be agreed between the two powers, as evidenced by the New Hebrides Order in Council ((25 September 1961) 1961 Statutory Instruments 1961/1831 [United Kingdom]). Neither power exercised joint or separate jurisdictional competence over all the occupants of the islands for all purposes. From the French perspective, shared influence over the New Hebrides meant that it was regarded under the Constitution of the Fourth Republic as a French Pacific possession rather than an overseas territory of metropolitan France. From the British perspective the New Hebrides was a protectorate under the protection of the British Crown, rather than a colony or dominium.
- 4 In international law the status of the condominium was uncertain. It was unclear whether the joint administration was any more than the sum of its parts. Although earlier case law suggested that the condominium government could not sue or be sued except as an international legal person (*Public Prosecutor v Nguyen Ngoc Zuyen* Joint Court of the New Hebrides (7 February 1941) (unreported) referred to by O'Connell 86), as the country approached independence there was greater scrutiny of the exercise of the administration's joint and separate domestic powers by the joint court (as in *Path v Commission du Contentieux Electoral (Judgment)* Tribunal Mixte des Nouvelles Hébrides [New Hebrides Mixed Tribunal] (23 July 1976) (1976) Décisions du Tribunal Mixte des Nouvelles Hébrides 6; *M Pierre Garsonnin v Administration Française des Nouvelles Hébrides* Tribunal Mixte des Nouvelles Hébrides [New Hebrides Mixed Tribunal] (17 August 1976) (1976) Décisions du Tribunal Mixte des Nouvelles Hébrides 11). Even in the 1960s the condominium government was being drawn into court proceedings, for example in appeals against sentence (*Balasanga v the Condominium* Joint Court of the New Hebrides (26 March 1963) (unreported); *Bing Tong v the Condominium* Joint Court of the New Hebrides (26 March 1963) (unreported)); and in land disputes (*Petition to the Court by the French Government, the Condominium Government and the Registrar of Titles to Interpret the Ownership of Public Roads (Judgment)* Joint Court of the New Hebrides (17 March 1964) Judgment No 746 (unreported); *Société Française des Nouvelles-Hébrides v the Condominium Government* Joint Court of the New Hebrides (7 July 1964) (unreported)).

- 5 Although geographically distinct and, by virtue of its creation, an international juridical entity, as a sphere of joint influence, any treaty which was to be binding on the New Hebrides had to be signed by and extended to the territory by the two powers. An example can be found in the General Agreement on Tariffs and Trade ('GATT') which was extended by Great Britain to its 'Dependant Territories' and by France to 'French Establishments in the Condominium of the New Hebrides' (Annex A and B). See also the Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs (139 LNTS 301), which was extended by France and the United Kingdom to the 'Archipelago of the New Hebrides under French and British Condominium' on 17 March 1950. In this way the New Hebrides could benefit from international treaties extended to it either directly, or indirectly. There are also examples of the condominium government entering into treaties in its own right, for example the Agreement between the Commonwealth of Australia and the Condominium of the New Hebrides for the Exchange of Money Orders ((1957) Pacific Islands Treaty Series 1). Any alteration in the scope of the condominium powers had to also be agreed by treaty as these constituted an amendment to the Protocol of 1914.
- 6 While the British Commonwealth Office was keen to rid itself of the financial burden of the New Hebrides from the 1960s, France feared this would trigger demands for independence in neighbouring, magnesium-rich New Caledonia. International pressure prevailed and the movement towards independence started in the 1970s. From 1977, resolutions passed by the elected Representative Assembly were, when approved by the Resident Commissioners, enacted as Joint Regulations. In 1979 a draft constitution was drawn up by a Constitutional Committee appointed by a New Hebridean Government of National Unity. Independence, however, could not be achieved until the two imperial powers revoked the Protocol of 1914. On 23 October 1979 by the Exchange of Letters Constituting an Agreement concerning the Granting of Independence to the New Hebrides (1212 UNTS 276), the era of joint rule was terminated.

B. The Republic of Vanuatu

- 7 The 1980 Constitution of the Republic of Vanuatu ('Vanuatu Constitution') declared 'The Republic of Vanuatu is a sovereign democratic state' (Art. 1 Vanuatu Constitution) and vested national → *sovereignty* in the people of Vanuatu (Art. 4 (1) Vanuatu Constitution). The extent of the territory of this archipelago of more than 80 islands was set out in the Maritime Zones Act No 23 of 1981 (Cap 138) ('Maritime Zones Act'), and included land and inland waters, the → *archipelagic waters*, → *territorial sea*, and → *airspace*, along with seabed and subsoil. Its territorial waters extended 12 miles from the archipelagic baseline (→ *Baselines*) and the 'low-water line of the coast of Matthew Island and Hunter Island' (Sec. 5 (1) (2) Maritime Zones Act). The co-ordinates for the archipelagic baseline are given in the Schedule to the Maritime Zones Act and are taken from British Admiralty Charts Nos 1575 of 7 September 1979 and 1576 of 24 November 1978. Beyond its territorial sea Vanuatu exercises sovereign power over the → *contiguous zone* of sea extending 24 nautical miles from the territorial sea baselines (Sec. 7(1) Maritime Zones Act).
- 8 In line with the international law of the sea 'all foreign ships may enjoy the right of innocent passage through the archipelagic waters and territorial sea' (Sec. 6 (1) Maritime Zones Act; → *Innocent Passage*). Vanuatu also exercises sovereign rights over its → *continental shelf* (defined in Sec. 8 Maritime Zones Act) and claims a 200 mile → *exclusive economic zone* (Sec. 9 (1) Maritime Zones Act). Within its continental shelf and exclusive economic zone Vanuatu claims: (a) sovereign rights for the purposes of exploration, exploitation, conservation, and management of all resources (→ *Conservation of Natural Resources*; → *Natural Resources, Permanent Sovereignty over*); (b) exclusive rights and jurisdiction for the construction, maintenance, or operation of artificial islands, offshore terminals, installations, and other structures and devices necessary for the exploration and exploitation of resources, or for the convenience of shipping or for any other purpose; (c) exclusive jurisdiction to authorize, regulate, and conduct scientific research; (d) exclusive jurisdiction to preserve and protect the marine environment and to prevent and control marine pollution; and (e) such other rights as are recognized by international law or → *State practice* (Sec. 10 Maritime Zones Act).
- 9 Art. 26 Vanuatu Constitution provides that:

Treaties negotiated by the Government shall be presented to Parliament for ratification when they either: concern international organisations, peace or trade; or, commit the expenditure of public funds; or, affect the status of people; or, require amendment of the laws of the Republic of Vanuatu; or, provide for the transfer, exchange or annexing of territory.

Vanuatu therefore has a dualist system whereby any treaty negotiated by the executive has to be incorporated into domestic law by an act of ratification by the Vanuatu Parliament.

C. Vanuatu's Treaty Portfolio

- 10 It is doubtful if Vanuatu inherited any treaty obligations or benefits at independence, even though under the Vanuatu Constitution existing French and British law continued to apply. At the outset therefore, the new State ratified several international treaties to which the condominium powers had been party. These included the → *Geneva Conventions I–IV (1949)* which were given effect by the Geneva Conventions Act No 22 of 1982 (Cap 150) ((24 August 1982)); certain International Maritime Conventions, which were given effect by the Maritime (Conventions) Act No 29 of 1982 (Cap 155) ((25 November 1982); the Vienna Convention on Consular Relations and the Vienna Convention on Diplomatic Relations which were given effect by the Consular Relations Act No 6 of 1988 (Cap 200) (16 May 1988)), and the Diplomatic Privileges and Immunities Act No 9 of 1982 (Cap 143) ((24 May 1982)) which also provides for the privileges and immunities relating to the → *International Court of Justice (ICJ)* (Sec. 8 Diplomatic Privileges and Immunities Act No 9). As a member of the South Pacific Forum, Vanuatu engages in international relations with its neighbours for mutual benefit, for example through the South Pacific Regional Trade and Economic Cooperation Agreement; the Pacific Agreement on Closer Economic Relations; the Pacific Island Countries Trade Agreement; and the Pacific Island Countries Trade Agreement.
- 11 British influence was retained through Vanuatu's membership of the British → *Commonwealth*. Early legislation, for example, the Extradition Act No 4 of 1988 (Cap 199) ((16 May 1988)) confirmed the international relations between the Republic of Vanuatu and the Commonwealth as well as other nations with which Vanuatu has bilateral or multilateral treaties. This has now been repealed and extended by the Extradition Act No 16 of 2002 (Cap 287) ((3 February 2003)) to cover countries of the Commonwealth, other Pacific countries, treaty countries, and other countries where the Minister in consultation with the Attorney-General agrees that a comity country is an extradition country.
- 12 As an African, Caribbean, and Pacific ('ACP') group country, Vanuatu's relationship with the European Union ('EU') is determined by EU-ACP initiatives such as the Partnership Agreement between the Members of the African, Caribbean, and Pacific Group of States of the one Part, and the European Community and its Member States, of the other Part ([2000] OJ L317/3; 'Cotonou Convention'), and it is currently under pressure to co-operate with the other Pacific ACP countries to conclude EU-ACP partnership agreements. Linked to this is pressure to apply for membership of the → *World Trade Organization (WTO)*.
- 13 As a member of the → *United Nations (UN)* since September 1981, Vanuatu has signed up to a number of → *human rights* conventions and was the first Pacific country to ratify the United Nations Convention on the Rights of Persons with Disabilities (Convention on the Rights of Persons with Disabilities (Ratification) Act No 25 of 2008 (23 June 2008)).

D. Current Issues in International Law

- 14 Because of its small size, location, and its limited resources Vanuatu is a weak international player. It is among the world's least developed nations and although found to be eligible for graduation in 2006 has recently sent delegations to ECOSOC to argue to remain on that list because of the financial benefits of doing so.
- 15 While the predominantly volcanic islands of Vanuatu do not face the same immediate threats of inundation due to rising sea levels as some of the coral atolls of their Pacific neighbours, international issues concerning the sustainability of marine resources, ocean pollution, the wider environmental impact of global warming, and climate change are all relevant to its future (→ *Climate, International Protection*). It is party to a number of conventions relating to Pacific fish stocks, especially tuna. As a member of the Secretariat for the Pacific Community based in French New Caledonia, Vanuatu ratified the Agreement Establishing the South Pacific Regional Environment Program (1982 UNTS 3) in 2005. It is also a member of the Forum Fisheries Agency founded in 1979 ((1979) ATS No 16).
- 16 Vanuatu is party to international environmental treaties such as the Convention on Biological Diversity (1760 UNTS 79), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (993 UNTS 243), and the Convention for the Protection of the World Cultural and Natural Heritage (1037 UNTS 151). It has also signed up to international conventions regarding the pollution of the oceans, for example, the Vienna Convention for the Protection of the Ozone Layer (1513 UNTS 324), which it ratified in 1994 (Vienna Convention for the Protection of the Ozone Layer (Ratification) Act No 3 of 1994 (Cap 231) (21 November 1994)), and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter of 1972 (1046 UNTS 138), to which it gave effect in 1992. In 2007 it gave domestic effect to the Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region ('Waigani Convention'; see Waigani Convention (Ratification) Act No 16 of 2007 (10 December

2007)). The efficacy of these international agreements however depends on other nation States observing them, and the Pacific Forum has repeatedly expressed its concerns on their failure to do so.

E. Conclusion

- 17 The condominium government of the New Hebrides was an anomaly, created to resolve an international impasse in this region of the Pacific. Characterized by shared territorial sovereignty—informed by differing perceptions of what this meant, and the limited exercise of collective powers—the scope of which were determined by treaty provisions, Anglo-French administration of the islands was neither ‘fish nor fowl’ as regards its status in international law. It may be argued that the arrangement left the New Hebrides insufficiently prepared for independence. Inheriting very little in the way of treaty benefits from the joint-powers, it had to rapidly engage with the international community to ratify or reject international treaties on a range of issues, many of which were of little or no direct concern to the people of Vanuatu. As in the period which led to Anglo-French government, in the period post-independence, the influence of Australian interests in the Pacific has been significant in shaping international relations and foreign aid dependency has been evident. Like other small island states and least developed nations, Vanuatu continues to be vulnerable to the agendas of larger international players.

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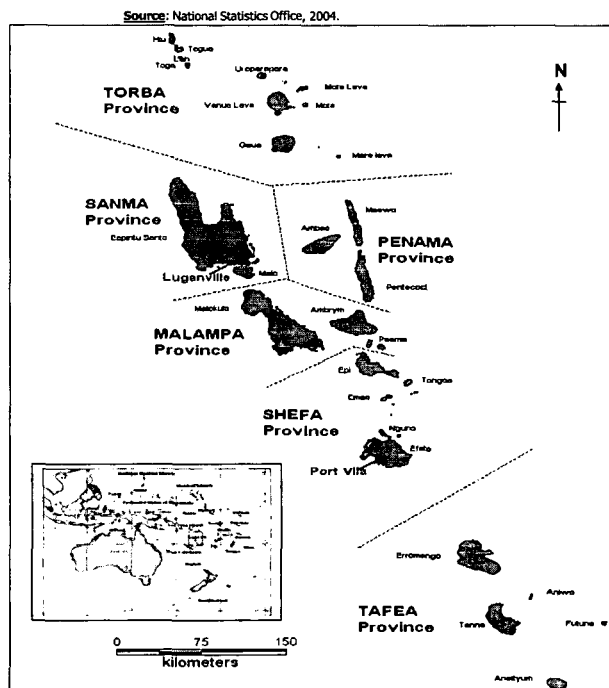
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FRAGMENTING LAND AND THE LAWS THAT GOVERN IT

Sue Farran

Map of Vanuatu



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Introduction

The legal pluralism which prevails in many South Pacific islands, especially those of Melanesia, is like an onion, multilayered and changing shape every time one investigates deeper. While the pursuit of understanding may not end in tears, it can certainly be a challenging experience. Take the issue of land tenure in the Republic of Vanuatu.

Prior to contact with outsiders in the late eighteenth and early nineteenth century, the Pacific islanders who inhabited these islands determined their relationship with the land, its resources and the marine environment that surrounded them according to customs and practices which may have been brought with them from elsewhere, or evolved according to need. Under colonial government for many indigenous people customs continued to be the governing force of their lives, although the incursions of English and French agents; the passing of joint regulations to control the relationships and transactions between indigenous and non-indigenous persons; the proselytising of Christian missionaries and contact with new forms of technology, language, economy and cultivation practices, all served to change the wider context in which customs and customary laws operated. There were therefore, even before the introduction of western laws, diverse customs, languages and practices. However I would suggest that legal pluralism really developed as an issue post-independence, when not only did a written constitution become the primary source of law, but all those laws introduced under colonial administration – from France and England under the Anglo-French Condominium government of the New Hebrides - which remained in force, applied to all citizens and residents of Vanuatu, as did, naturally, all laws made by the national parliament as well as existing customary law. Moreover independence provided the opportunity for greater assertion of a national identity, of which a personal system of law is one aspect, and placed the onus for resolving internal conflicts of laws on the national courts and legislative body.

This in itself might not have been a problem if different laws applied to distinct legal subject matters, but that was not the case. In particular it was not the case in respect of land. There are historical reasons for this but the consequence is contemporary. This paper considers the background to this plurality of laws, contemporary manifestations of it, and the advantages and disadvantages of this inner pluralism in the context of development and the recognition or denial of cultural diversity.

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In the hierarchy of laws which apply in Vanuatu the Constitution is supreme and therefore the starting point. The Constitution establishes not only the sources of law to be applied to land, but also the forums for dispute settlement, triggering at the outset a degree of confusion. These forums, however, also provide a key for exploring the plurality which is central to this paper. In particular the evidence presented to support land claims before the islands courts, as reported in the case-law, has been examined to investigate and illustrate the plural nature of customary land tenure.

Land, the law and legal process

The applicable laws

The 1980 independence constitution of the Republic of Vanuatu, restored at one blow perpetual title to all land to the indigenous custom owners (Constitution, Article 74),¹ and provided that the rules of custom should form the basis for the use and ownership of land. No further indication regarding the nature, extent or applicability of the rules of custom was given, and none has been forthcoming, although no doubt this was envisaged. Consequently the 'rules' that govern customary land tenure are inchoate. Nor is any guidance given as to when the observance of custom becomes a 'rule', a point to which I shall return.

Customary tenure however, is not the only form of interest in land. Under colonial influence leases were introduced – originally under French and English laws, and these have been continued post-independence along with more novel forms of land holding such as Strata Title.² While perpetual title to land vests in the custom owners, land may be alienated under lease for periods up to seventy-five years, either to other indigenous people, or to non-indigenous people. Once a leasehold is secured over land, then the land can be sub-divided, developed and also used as security for mortgage finance – banks and lenders are reluctant to lend against the

¹ Apart from relatively small areas of public land located in the two metropolitan areas of Port Vila and Luganville.

² Freehold estates or absolute ownership was also in use but as it no longer exists is not considered here.

security of land held under customary tenure for a variety of reasons.³ Inevitably the lease requires that the leaseholder has exclusive possession thereby ousting the claim of the customary owner to use or occupy the land for the duration of the lease – which will span several generations. At the end of the lease the land will in principle revert to the customary owner, but in practice – although in most cases this remains to be tested,⁴ the customary owner may have to compensate for improvements or offer to renew the lease.

The formal forums for dispute settlement

The Constitution also made provisions for the establishment of courts which would have – among other things, jurisdiction to determine land claims. Initially it was the Islands Courts with appeal to the Supreme Court that heard land cases.⁵ The Island Courts Act (Republic of Vanuatu 2006: Cap 167) conferred power on the Chief Justice to establish such courts throughout the country. The jurisdiction of each court was to be determined by the terms of the Chief Justice's warrant for each court, although the Act envisaged Island Courts having both civil and criminal jurisdiction. They were to be supervised by a chief magistrate but it was the President of the Republic "acting in accordance with the advice of the Judicial Service Commission" who was to appoint "not less than three justices knowledgeable in custom for each Island Court at least one of whom shall be a custom chief residing within the territorial jurisdiction of the court" (s. 3(1)). The court was fully constituted when sitting with three justices and a clerk and the court was to

³ For example, the lender may be reluctant or unable to come into possession to manage the land and will be unable to sell the land as customary land cannot be alienated. The land could be leased but if it is located in a customary land area this could cause social tensions.

⁴ Vanuatu is only a young country so most of these leases still have many years to run.

⁵ Island Courts Act 1983, supplemented by the Island Courts (Power of Magistrates) Order 2003; Island Courts (Supervising Magistrates) Rules 2005; Island Courts (Civil Procedure) Rules 2005; Island Courts (Criminal Procedure) Rules 2005; Island Courts (Court Clerks) Rules 2005; Island Courts (Amendment) Act No 29 2006.

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administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order (Island Courts Act, s. 10).

The procedure of these courts was established in subsidiary legislation (Island Courts (Civil Procedure Rules) 1984 as amended). The first courts were set up in 1984 and by 1999 there were eight such courts (Jowitt (1999)). This meant that a number of areas did not have a court to hear disputes relating to customary land. Indeed it has been suggested that

[t]he most obvious problem is the fact that many of these courts exist in name and warrant only. Adequate funding and personnel are lacking, so most island courts are mere fictions. Those that do operate tend to do so sporadically, resulting in large delays for complainants. (Jowitt (1999))

Although some of these issues have been addressed, it is still the case that there are only eight island courts, which means that many islands, even large ones such as Pentecost, are without a court. Nevertheless, while the applicable law may have been uncertain, the forum and procedure was relatively clear.

However, the jurisdiction of those courts that were established under warrant encompassed not only people from different islands but also observing different customs. This was hardly surprising as

Vanuatu is very ethnically diverse, with approximately 108 distinct linguistic and cultural groups ... with such cultural diversity there is no such thing as a single custom law that applies to all of Vanuatu.... [A] person may therefore be judged by justices who operate under customary norms that they are not familiar with. (Jowitt (1999))

The courts that did exist were therefore likely to be faced with a plurality of customs informing land tenure practices, and even if those who sat on the bench were knowledgeable in custom it was unlikely that this knowledge could encompass great diversity. The probability of complainants not being satisfied with the adjudication of disputes was therefore, high. Consequently, almost all cases were appealed to the Supreme Court, creating not only an insurmountable backlog of

cases, but also subjecting customary land disputes to an adjudication process that was not customary (although assessors knowledgeable in land matters could be asked to assist the bench). Twenty years after independence the Supreme Court refused to hear any more land appeals. In 2001 the civil jurisdiction of island courts to hear customary land disputes was removed (Island Courts (Amendment) Act 2001, which came into effect in 2002).

That same year (2001) the Customary Land Tribunal Act set up a new tier of courts to consider and rule on customary land claims. In part this new structure was designed to address some of the problems identified above. At the lowest level the village tribunal is meant to encompass a particular custom area, so that the chief who chairs it and the two other members co-opted to sit on it (chiefs or elders) are knowledgeable about the custom affecting the land within its jurisdiction – although they are not meant to have a personal interest in the outcome. Where land traverses village boundaries then there is scope for a joint tribunal. Appeals from this local level are to a custom sub-area land tribunal, which represents a larger jurisdictional area in which there may be a number of villages sharing similar customs, and from there to a custom area tribunal and ultimately the island land tribunal. The panels for these tribunals are drawn from chiefs sitting on the area, or sub-area council of chiefs, or island council of chiefs. However, not all areas yet have customary tribunals and the efficiency of those that do exist has been questioned (Republic of Vanuatu Department of Lands 2003). A review of the Customary Land Tribunal system in 2004 found that there were considerable problems including the fact that people were unaware of the tribunals and did not understand how they functioned; there was lack of support for them; and a general lack of ownership of them. Moreover, it was found that the new system was perceived by many chiefs to be undermining customary rules – partly because of the process of appeals and possibility of rehearings (Regenvanu 2008: 65), while in a number of areas disputes about rightful holders of chiefly title raise challenges about the eligibility of those entitled to sit on the tribunals. Further review of the operation of the tribunals is currently underway.

Despite land dispute jurisdiction being transferred to the Customary Land Tribunals, Island Courts continue to hear and rule on land disputes which have been pending prior to the change in the law. Similarly, although apart from the possibility of judicial review or appeal on the grounds of procedural irregularity (exercised in *Umou v Erromango*) the jurisdiction of the Supreme Court over customary land matters ceased, in practice land cases still come before the Supreme Court – and from there to the Court of Appeal, not only on procedural grounds but

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also because land which is the subject of dispute concerning customary interests may also be subject to leasehold interests or claims.

Under the Land Leases Act (Republic of Vanuatu 2006: Cap 163) only the Supreme Court has jurisdiction to hear disputes concerning leases, pursuant to sections 1 and 100. However, an existing and even registered lease may be affected by a dispute that is pending before the Island Court or Customary Land Tribunal. For example, in the case of *Solomon v Turquoise*, the Court set aside a registered lease because there had been an attempt to register it while there was a title dispute going through the Customary Lands Tribunal. Although the Minister of Lands has statutory power to enter into leases over disputed land, the Supreme Court has held that where he does so ignoring the views of custom owners of which he is aware, then the lease may be held to be defeasible. Similarly, where an existing lease is transferred or sold on, failure to obtain the consent of the custom owners where this is required (for example under Land Leases Act, s. 36), or where there is a dispute between custom owners as to whether the lease should be sold on or not (see for example *Vanuatu Fisaman Cooperative Marketing Consumer society Ltd v Jed Land Holdings*), could lead to the subsequent lease being ruled invalid, especially if the original lease was granted in breach of the required consents.⁶ Magistrates courts too may encounter land disputes in the course of dealing with other related matters, for example family issues concerning succession, legitimacy and beneficial entitlement to income generated by land.

There is therefore a plurality of formal forums for determining land issues.

Informal forums

To complicate matters further however, besides these formal forums for hearing

⁶ It is not entirely clear if this is mandatory as the section reads:

Upon the registration of a lease containing an agreement by the lessee that he will not dispose of the land leased or any part thereof or interest comprised therein without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the written consent of the lessor verified in accordance with section 78 has been produced to the Director.

land disputes there are also informal forums held at the village or family level, where a single chief or a committee may hear land matters and adjudicate these, usually with the aim of arriving at a negotiated settlement, maintaining the peace and harmony of a village or local area or arriving at an equitable distribution of resources. This traditional process of resolving land disputes pre-dates independence and seems to have survived the Anglo-French Condominium - except where such disputes were between indigenous and non-indigenous land users and occupiers.⁷ For many people these local forums are the only ones to which they have access. The contemporary role and function of chiefs within this legal system is unclear. On the one hand, at a national level, the Constitution states that the National Council of Chiefs

has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages (Constitution, Article 30(1)).

(It also has the right to “be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament” (Constitution, Article 30(1)). It appears, although it does not say so, that this includes making statements of policy on land or customs regarding land, as these policy statements are referred to by Island Courts from time to time (see for example *Awop v Lapenmal*). However, the National Council of Chiefs (Organisation) Act (Republic of Vanuatu 2006: Cap 183), says nothing about their powers, dealing only with the composition of the Council. Under the more recent National Council of Chiefs Act 2006, the functions of Island and Urban Council of Chiefs are stated. These are to: resolve disputes according to local custom; prescribe the value of exchange of gift for a custom marriage; to promote and encourage the use of custom and culture; to promote peace, stability and harmony, and to promote and encourage sustainable social and economic development (s. 13). On the other hand, none of the above provisions appear to give Councils of Chiefs at national, local or village level adjudicative powers as such. Nor is it clear where chiefs who do not sit on these various councils, fit in. In a number of reported Island Court decisions reference is made to informal dispute resolutions and the decisions of chiefs, but these do not invariably determine the outcome any

⁷ In such cases British and French agents seem to have intervened, at least until the Joint Court was established under the Condominium government under the 1906 Convention.

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more that written documents are taken as *prima facie* evidence of title or transactions.

Moreover chiefs have a number of roles. They are not merely the adjudicators of disputes. They also hold and often control interests in land which in a hierarchical social structure may confer considerable power on them as well as obligations. Indeed it may be difficult to disassociate chiefly title from customary land tenure. It has been held that

[t]his chiefly system is attached or twined with the land tenure system ... [because] a chief once ordained by his paramount chief is always allotted a land to work. In return, such head chief must perform custom leases to the paramount chief or other subordinate chiefs who had allocated them Land" (*Mata v Mata*, referring to the custom of Tonga, Shepherds and North Efate).

Moreover, in some parts of Vanuatu, such as north-west Malekula, rank and land rights are hierarchal, with a paramount chief granting land within his land to lesser chiefs who in turn grant land to others within his bloodline. The paramount chief is responsible for ensuring that everyone within the territory he governs has land and for distributing it equally to subordinate chiefs (*Sanhabat v Salemunu*). However in Ambrym it is clear that while the person who originally settled on the land and exerted control over it was likely to become the paramount or senior chief,

[t]he community as a whole would have other chiefs beside the land owning chief. A chief would normally be nominated by the community based on wealth, bravery and other common characteristics. The land owning unit would also have a chief, a nakamal and a nasara. There would be other chiefs as well within his controlled land. (*Welwel v Family Rorrmal*)

As these chiefs progress up the hierarchy of chiefly titles through pig-killing ceremonies so their power and influence can increase, but equally it can be challenged, for example if they loose popular support. Chiefs today, moreover, may combine political power with traditional power, or assert their authority on the basis of preferment conferred under colonial administration – which often misinterpreted the traditional social organisation of indigenous societies.

The ambiguous role of chiefs, as both figures of authority, adjudicators of disputes

and customary land owners is further complicated by the fact that disputed titles are heard by the Island Courts, while land claims are heard by the Customary Land Tribunals. The competence of chiefs to adjudicate land claims within and outside the formal system has been challenged (Mackenzie 2006: 4), and the possibility of transferring from an informal system to the more formal one of the Customary Land Tribunal – in which the same chief(s) may sit, means that disputes can continue over an extended period of time. Nor should it be overlooked that judges in the formal courts may claim familiarity with custom that they bring to bear in non-customary courts, or may claim a familiarity with custom that might be questionable, at the very least on the grounds that they are seeing that custom as an outsider, or through translation, or through the lens of a person educated in a different system.

There are therefore not only many forums, but also many possible adjudicators. Added to this there are also many laws, if customs have the force of law. It is to the evidence of these customs that this paper now turns.

Customary land tenure

Traditionally the writings of anthropologists have provided an insight into customary land holding patterns and practices. (For more detailed comment on customary land tenure in Vanuatu see: Guiart 1996; Rodman 1995.) For the lawyer, however, the reported decisions of local courts provide a rich repository of information relating to land claims, in which can be traced some of the earliest land alienation to colonial settlers and missionaries right up to the present day alienation and sub-division of land to developers, as well as changes in use from subsistence agriculture to tourism entrepreneurship. Indeed the evidence led to support or refute indigenous claims to land may provide insight into past and present customary laws, although they tend to be claims of fact or opinion rather than law. In particular, free from the rules of procedure and evidence that constrain the more formal court system, these case studies reflect value systems in a shifting environment, where the claims of custom must work alongside bills of rights in written constitutions and the provisions of international conventions without losing its way. Although not presented as rules, the process of creating law reports may itself be seen as shaping and articulating customary law by converting oral histories into written records for future generations. So, while the recording of land disputes in writing is one way of ensuring that customs and customary forms of land tenure are not lost, at the same time this process changes custom, not only in form, but

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also in substance.

The Nature of Indigenous Land Tenure in Vanuatu

As indicated, customs are not presented as a set of rules or principles in the reported cases but as evidence of fact. The two main types of evidence that tend to be offered in land disputes are evidence of boundary descriptions and evidence of genealogies. Boundary descriptions involve tracing the physical boundaries of land by reference to physical objects, such as paths, streams, trees rocks, rivers, and later gates, roads, fences, airstrips, schools, churches etc. Names given to places – especially in the local language, are also significant, as is the ability to identify them on a site visit. These visits are required by law in the case of land claims (Rule 9). To the outsider, evidence of bloodlines are extremely complex and often confused by factors such as custom and baptismal names applying to the same person, or an accumulation of names over the course of a lifetime through the acquisition of titles through grade-taking; polygamy; adoption and the misspelling of names when committed to writing. It also clear that genealogies can be manipulated and selectively created to achieve desired outcomes. These problems may be so pervasive that the court is unable to reach a conclusion, as happened for example in *Billy v Ameara*, in a dispute that had been pending for twenty years. Challenges on the grounds of falsified or fabricated family trees are common. Genealogies will often need to be corroborated by supporting genealogies, or may be undermined by challenging the number of generations recalled or weaknesses in related evidence such as custom ceremonies linked to awards of status, or claims to long histories which are not supported by physical evidence – for example the number or size of stones used to mark pig-killing rituals.

The link between claims of fact and the emergence of custom rules arises when the court has to decide what weight to give to the evidence. Something is deemed to be a custom carrying authority when it amounts to a

rule blong law we ifomem fasin mo conduct blong pipol long wan society we hemi establish bifo finis mo ino replacem any kastom. Law ia oli no writem daon mo pipol iliv wetem. [A long-standing legal rule which determines the way in which people of a society conduct themselves and act, which informs but does not replace custom. Such a law is not written down but lived]. (Tenene v Kalmarie)

In the Shepherd Islands a customary obligation is similarly defined as “an existing principle which informs/shapes the way in which the people in one society conduct themselves and on which customs are based. The rule/principle is unwritten but people live according to them” (*Mata v Mata*).

Although, as is common in Melanesia, the customs relating to land are not homogenous, there are similarities which emerge though the case-law. Indeed claims of difference may be over emphasised – possibly for other reasons.⁸ Traditionally rights to land were created by settling on the land and building the first ‘nasara’ or meeting place there.⁹ Subsequently title could be established

⁸ For example, to distinguish political allegiances to different ‘Big Men’ or to ensure that marriage is to those within or outside a particular clan depending on what rules prevail in any one area.

⁹ ‘Nasara’ – dancing ground or public area in a village (Crowley 1995: 165). See for example *Manassah v Koko* in which it was explained, with reference to land tenure in Malekula, that

[i]n this region, land is communally owned based on common descent, residence within a nasara and participation in common activities. A tribe or a bloodline is identified with the land through its nasaras . Within an original or big nasara there are small nasaras or *Smol faea* which are associated in some respect with the original nasara and its paramount chief. The same word *smol faea* is interchangeably used for referring to a subordinate or lower chief. The same token is applied with the word *Big faea* meaning higher chief. Individuals within a tribe are closely tied up with his territory by affinity and consanguinity through blood and marriage.

Similarly in Paama it was stated:

[G]enerally the island of Paama is predominantly a patrilineal society. Ownership of customary land is communal or collectively owned based on common descent, residence within a nasara and participation in common activities. A tribe or bloodline is identified with the land through the nasaras. Individuals within the clan are closely tied up with their territory by affinity and consanguinity through blood and marriage. A group of persons

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through the physical evidence of graves, boundary markers, the planting of trees, and oral evidence of lineage and certain ceremonies.¹⁰ In some cases people from one island were allowed to settle on land in another island, either because of established blood or affinity links or as licencees fleeing disaster or fighting on their home island. These migrants came under the guardianship of the custom land owners. The transfer of land from one generation to the next was, in some areas, matrilineal, and in others patrilineal. Sometimes it would change from one system to the other, and then back again, or be ambi-lineal. Tracing genealogies therefore was, and still is, an important aspect of land claims and often contentious. Similarly there may be differences in interpreting the applicable custom.

At the same time, consideration of the case-law reveals much about the various facets that make up customary land tenure, including: cosmology and rituals that inform human associations with land; the importance of ancestors and kinship structures; the significance of physical features; and the importance of oral history. So for example, from the reported cases of the Island Courts we learn that the custom in Tongoa, Shepherd Islands and parts of North Efate is that where a paramount chief grants land to use to a lesser chief, the latter must

... perform custom leases to the paramount chief or other subordinate chiefs who had allocated them Land. There are two types of custom leases namely '*Fanga Sokora*' (first harvest of vegetables) and '*Nasau Tonga*' (harvest of animal) paid to the chief. This is a customary obligation that is practiced from generations to generation throughout the Shepherd Islands. (*Mata v Mata*)

Similarly in Epi

... there is a customary obligation for a Paramount Chief to allocate land to his assistants together with their boundary limits.

belong to a family line and a territory is sometimes identified with a totem, such as a plant or an animal. (*Holuon v Edward*)

¹⁰ For example where pig-killing is the standard custom ritual for ascending through the ranks of chief stones may be used to mark pig-killing sites (*Sanhabat v Salemunu*). Customs to do with marriage, adoption and burial are also frequently recalled.

As a matter of reciprocity a custom lease is normally paid to the paramount Chief. .. any isolation or absence of these founding aspects to land would prove an invalid custom. (*Family Mokono v Peter*)¹¹

In central Malekula the case law demonstrates that the communal ownership of land is based on three elements: “common descent, residence within a nasara and participation in common activities”. Individual rights are dependent on a person’s association with a tribe or a bloodline – through affinity or consanguinity, which in turn is “identified with the land through their nasaras” (*Alanson v Malingmen*, confirmed in *Sanhabat v Salemunu*). Patrilineal inheritance through the eldest son predominates. However the eldest son is expected to provide for equal distribution between his siblings. (A similar obligation is found in parts of Santo: *Noel v Toto*.) Matrilineal inheritance only comes into play if there are no male heirs and then only as an interim measure (*Abel v Timothy*. Note however that ‘interim’ may span several generations.) However, there are “customary obligations that requires strict performances in order that the right to own the land can be transferred to the mother’s children”. These are explained thus:

... the mother’s line ... is under customary obligations to provide some genre of customs gifts or payment of recognition to the patrilineal line. Such sort of ritual would in return allow and guarantee the children of the mother having blood connection to the patrilineal line to secure some rights of use of the land of their male heirs. (*Tomoyan v Shem*)

Anyone adopted into a bloodline has a lesser right than a natural member of that bloodline: “adoption is only a sign of acceptance to live under the guardianship of another family ... this acceptance or recognition would only exten(d) to the right to use the land excluding ownership” (*Alanson v Malingmen*).¹²

¹¹ The use of the word ‘lease’ here is confusing. A ‘tithe’ or ‘tribute’ might be more appropriate.

¹² This is distinguishable from the view of the National Council of Chiefs – the Malvatumauri which suggests that adoption after a period of four or six generations would confer full rights of ownership. In central Malekula this would only be the case if there were no bloodline male heirs.

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While Malekula has two main tribes 'Big Nambas' and Smol Nambas' there are variations in customs within these. For instance in one case it is explained that

... the custom practiced in this locality varies from that habitually observed by the smol nambas tribe in the central part of the island of Malekula. A nasara is divided into three nakamals. It is often described in the following words: "A nasara is like a house which has three main parts, the front, the body and the back or tail". Authority or respect is always paid to the head or front of the mansion. The head of the house or nasara is traditionally called (*Amai*), the body (*Amahai*) and the tail (*Amesuwe*). (*Kaising v Kaites*)

In south Pentecost, where settlers and missionaries caused people to relocate within the island, it appears that land use and ownership rights may be acquired not only by bloodlines but through the appropriate performance of custom ceremonies, for example pig killing, observing funeral duties and rituals, and ensuring that infant children are reared on the land (*Tabi v Tabisari*: in this case it was held that land could pass through both sides of the family). Similarly in Ambrym it has been explained that

ownership of customary land is communal or collectively owned based on common descent, residence within a nasara and participation in common activities. A tribe or bloodline is identified with the land through the nasaras. Individuals within the clan are closely tied up with their territory by affinity and consanguinity through blood and marriage. A group of persons belong to a family line and a territory is sometimes identified with a totem, such as a plant or an animal. (*Welwel v Family Roromal*)

Totem associations are also found in South Efate.

Fragmenting the land

Cases brought before the courts and tribunals reveal the multiplicity of interests over land that can exist in custom and which have co-existed over many generations. Sometimes it is this multiplicity of traditional interests which cause disputes, and often these are resolved in traditional ways. In recent years however,

tension is more likely to arise because those who claim to be the custom owners are seeking to develop the land or negotiate with investors for a lease (for example, *Malas v Tretham Construction Ltd*), and seeking to exclude thereby, the non-ownership rights and interest of others. The nature of land use is therefore changing the cause of disputes. This potential for disputes is aggravated by a number of factors. These include the power of the Minister of Lands to intervene to manage land where ownership is in dispute, the growth of individualism whereby group interests may be sacrificed for individual gain and advancement, a largely unregulated market populated by middlemen which encourages and brokers land alienation and land acquisition between indigenous and non-indigenous parties, and pressure by external agencies for Vanuatu to develop its opportunities for inward investment, to capitalise its limited resources and put in place frameworks which promote economic development, often at the cost of sustainability.

Not only is the climate and environment of land transactions and land use changing. The procedure of dispute settlement is also changing the way in which land interests are presented and perceived.

Despite the modification of rules of evidence, indicated above; the exclusion of legal representation; and the expectation that those who sit to hear customary land claims are knowledgeable about custom, it seems inevitable that committing the record of the court or tribunal deliberations to writing will change customary land tenure, distinguishing oral custom which has not been subject to court or tribunal scrutiny, from that which has. This will give rise to a duality of custom: the recorded and the unrecorded.

Once there is a written record then there is the possibility that this will be referred to in future cases, partly due to the rule of precedent which informs the jurisprudence of the courts in common-law-influenced systems, and also because similar fact cases will lend themselves to recollected former decisions. In this way previously oral evidence may become frozen in time, codified, and less adaptable to changed or changing circumstances. The development of certainties through case-law is part of the common-law mind-set, which dislikes in particular uncertainty as to ownership of property, the idea of land lying waste or idle, or the possibility that a case once decided upon, could be reopened by subsequent parties. Evidence of this process can be found in some of the more recent judgments of the Malekula Island Court, where the narration of 'the Law, Custom and History' is being repeated almost verbatim from previous cases even where the land is situated in different places and the history and customs are different.

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The language of the court may also change custom. Court proceedings are in Bislama, one of the three official languages of the Republic of Vanuatu. Where a witness or claimant does not speak Bislama then an interpreter may be used. The language of the court record however may be in English or Bislama (or potentially French). However the languages of education are English or French, so the ability to write Bislama tends to be learned informally – with consequent variations in spelling. Moreover legal language or concepts may be adopted.¹³ In some cases this has a significant effect on the application of customary practice. For example in *Awop v Lepenmal*, consideration of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW),¹⁴ read with the written provisions of the Constitution (Article 5(1), led to the court holding that advancing the traditional superiority of land claims based on patrilineal descent and affiliation over matrilineal ones was discriminatory, despite the fact that the claim being sought was a historical one, not a contemporary one, thereby distinguishing it on the facts from the case of *Noel v Toto*, which was referred to. A similar line of reasoning was followed to support a matrilineally based claim in *Haitong v Tavulai Community*. Similarly in the latter case, evidence was led that indicated land had been taken by force and settled on by the victors, who later alienated some of it to foreigners. The court held that not only was the idea that land taken in battle became the victors contrary to customary practice, but also that “[t]his is a selfish idea and cannot find favour in this modern world with laws upholding principles of natural justice, fairness and equality” (*Haitong v Tavulai Community*). Consequently even land obtained by conquest had to be returned to the original owners – even where these had been decimated or scattered by the tribal warfare. Arguably this retrospective application of contemporary legal principles to fact based claims of historical events is inappropriate and was not intended under the provisions of the Constitution. This approach may also be inconsistent with the fundamental meaning of custom, indicated above, but also marks a departure from earlier case law where it was made clear to the parties that:

¹³ For example the expression ‘time immemorial’ was used in *Awop v Lapenmal*, while the transfer of land as a consequence of a bet was rejected in *Haitong v Tavulai Community* on the grounds that it had not been made in ‘a goodwill manner’ and was not a ‘legitimate’ or ‘binding’ agreement.

¹⁴ This was integrated into domestic law by the Convention on the Elimination on Discrimination Against Women by the Ratification Act of Parliament No. 3 of 1995.

Kot imas mekem iklia long ol patis se ol storian we bae oli talem long Kot blong pruvum se whu nao iraget ona blong graon ia bae kam aot nomo long ol kastom blong yumi long Efate mo Pango. Hemia imin se ol patis oli no save tokbaot loa blong waetman blong pruvum kes blong olgeta. Oli mas tokbaot nomo wanem we kastom italem se olgeta nao oli tru kastom ona long graon ia' [The court must make it clear to all the parties that the stories they narrate to support their claim to the land must derive from the customs of this place. That means that the parties must not talk about or rely on white man's law to support their claim, but only the true custom of this area. (My translation)]. (*Kalmatalu v Wit*. See similarly *Family Mermer v Taliban*.)

As the value of land as a marketable commodity increases, so it is likely that more litigation will ensue and while representation by lawyers before the customary land tribunals is not permitted by the legislation, it is highly probable that those who can afford to will seek professional or quasi-professional assistance. The language of the law will then creep in and it too will change concepts and meanings.

Conclusion: Development and the Recognition or Denial of Cultural Diversity

This plurality of laws which may apply, forums which may be seized and procedures which may be followed are seen by some as an obstacle to development. In particular they are seen as inhibiting the commoditisation of land for which clarity of ownership and indefeasibility of title is desirable. For example, the 2006 *Final Report of the National Land Summit* states in respect of the identification of legitimate custom land owners, that one of the problems was that there were "no clear custom rules available for chiefs to go by" (Tahi 2006: 24). Similarly writing about the land tenure system of South Efate, Fingleton et al. have stated "there is confusion about what is customary and how far kastom can form the basis for modern land tenure" (Fingleton et al. 2008: 29). At the same time however, this complex plurality of land interests may operate as a bulwark against too rapid land alienation. Both sides may lay claim to the obscure and elusive nature of customary land tenure – versus the certainty of introduced land interests and estates such as lease, freehold, registered title and surveyor's maps. In an arena where there is little equality of bargaining power, and where developers are

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likely to have financial and legal resources, the confusion of customary land tenure may operate to protect indigenous interests. This may of course be a charade, a masque. For while there is a plurality of customs which determine land interests, a reading of the case-law suggests that this plurality is not indecipherable, unknown or uncertain, except where a party who desires it to be so makes it so. Maintaining a pluralism within pluralism may be, either consciously or unconsciously, a way of maintaining indigenous integrity and cultural diversity against the onslaught of globalisation and universalism; a way of frustrating the fragmentation of land that is alien to and often in conflict with, the fragmentation that takes place in custom, especially when the emphasis is on individualism and monetary economies and ignores the need for inter-generational equitable distribution of land and its resources and the importance of social cohesion and community support in a country where the state provides virtually no social welfare of security. Pluralism within pluralism may therefore be not just a shield, but a sword.

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PART TWO

THE CHALLENGES OF DEVELOPMENT AND ITS CONSEQUENCES

3. „Making Land Work in the Pacific? Evaluating Land Reform in Vanuatu’, (2009) *LAWASIA Journal* 44-61
4. Land as a fundamental right: a cautionary tale’, (2009)40(1) *Victoria University of Wellington Law Review* 387-402
5. „Vanuatu: a tinder-box in the Pacific’, in B. Edgeworth and L. Bennet-Moses (eds) *Property and Security: Selected Essays* (2010) Law Book Co, Thomson Reuters, Australia, 69-87
6. „Selling the Land: should it stop. A case-study from the South Pacific’, in M. Dixon (ed) *Modern Studies in Property Law* (2009) Hart Publications, Oxford, 289-311

Introduction

This part consists of four published works, two of which are journal articles and two of which are book chapters. Apart from the last, these outputs were aimed primarily at readers in the Southern Hemisphere, particularly New Zealand and Australia, both of which are near neighbours to Vanuatu and both of which are closely involved in development strategies because of their role as aid donors,¹ trading partners, providers of human resources and skills training and often the source of initiatives

¹ Australia contributes \$(AU)1.6 billion overseas development aid to the Pacific (\$650 million of which goes to Papua New Guinea) and \$2.35 billion to global programmes managed by agencies such as the World Bank, Asia Development Bank and UN bodies, some of which also reaches the Pacific. Figures from Australia Government website <http://www.aisaid.gov.au/makediff/Pages/default.aspx> (last accessed 14/03/13). Over half of the whole New Zealand aid budget is spent in the Pacific. In 2011/12 Vanuatu received \$(NZ) 20 million. <http://www.aid.govt.nz/about-aid-programme/aid-statistics/aid-allocations-20112012> (last accessed 14/03/2013).

for law reform. As Britain has turned more towards Europe and withdrawn from the Pacific, both in terms of aid funding and diplomatic presence, Australia and New Zealand, but particularly the former have become increasingly important spheres of influence, vying in the Pacific with other major powers on the Pacific rim: China, Taiwan, Japan and Indonesia. The fourth publication (Publication 6) was directed at a slightly different audience. This chapter is based on a conference paper given at an international gathering of property lawyers in Cambridge. The aim of the paper was to raise questions about a number of assumptions underpinning the English common law of property, much of which was introduced into the legal systems of many Pacific island countries including Vanuatu. The case-study of Vanuatu highlighted the dangers of legal colonialism and the possible long-term consequences of legal transplants into very different host environments.

The first publication (Publication 3), takes as part of its title a policy paper of the Australian Government „Making Land Work’ (2008).² Although not proposing to be a „blue print’ for Pacific island countries, the thrust of this two volume policy paper is to explore options for making land more productive in Pacific Island States and to reconcile customary land and development. The AUSAid publication uses a number of case-studies in its Volume Two. In Publication 3 I offer my own case-study highlighting the challenges confronting the type of initiatives which were being supported by aid intervention. Continuing the theme of pluralism introduced in Part One, I draw attention to the potential for parallel land systems, one aligned with development strategies and one based in customary land tenure. Implicit in the debate and explicit in policy documents such as AusAID’s „Pacific 2020’,³ is the potential for tension between encouraging rapid economic growth and ensuring social stability and security (a theme to which I return in Publication 5). The first publication in this part also draws attention to the different discourses about land which started to emerge in the first decade of this century, key to which was the articulation of a number of resolutions at the National Land Summit in 2006. What has become evident over the years is the converging and diverging of different

² AusAID (2008) Making Land Work
http://www.ausaid.gov.au/Publications/Pages/3363_9223_6836_1452_8140.aspx.
This is referred to in Publications 3, 4 and 5 in this part.

³ Pacific 2020: Challenges and Opportunities for Growth, AusAID.

expressions of policy and strategy with the consequent confusion of authorship and responsibility. While these appear to point to a willingness to engage with land issues and reflect ongoing aid intervention, as this and the following publications seek to demonstrate, little of positive consequence has been achieved.

This lack of success is due to a wide range of factors. In Publication 3, I suggest that there are problems with the selection of agencies: the National Council of Chiefs and the National Cultural Centre. I also suggest that the broader land picture is not being addressed and I highlight new strands of pluralism illustrated by squatter settlements in the urban and peri-urban areas, inequalities of wealth and opportunity between indigenous ni-Vanuatu, and the extra-legal activities of non-indigenous residents in respect of land which are not being integrated in the evolving legal system and do not have their roots in the plurality of laws which emerged at independence. I suggest that the complexity of land in the context of Vanuatu requires reconceptualising the ways in which customary land and development can be reconciled, pointing out the need to beware of legal forms which make uneasy transplants, or which have been tried and tested elsewhere in the Pacific region with mixed success. I conclude this paper by urging the national government to assume greater responsibility towards its own resources and people and for aid donors to stand back and assess the strategies they are advocating.

The second publication in this part (Publication 4), approaches land in Vanuatu from a fundamental rights' perspective drawing on international and national rights instruments to emphasise the legal importance of land. The publication is one of a collection of papers originating from an international conference entitled 'Protecting Human Rights in the Pacific' held in Apia, Samoa, in April 2008.⁴ The central theme of this publication picks up on the responsibility of the state and other agencies to secure land rights for the indigenous people of Vanuatu, but many of the arguments I make could equally be applied to other indigenous people and other governments within the region and beyond, and I draw attention in the opening pages of this publication to other forms of natural resource use which threaten or could undermine fundamental rights. I consider the potential positive impact that legal regulation and

⁴ See for an introduction to the collection by Petra Butler
<http://www.upf.pf/IMG/pdf/06-DH-Protecting-Human-Rights-in-the-Pacific.pdf>.

intervention can have on protecting and enhancing fundamental rights, including social and economic rights, and the possible negative impact that can arise as a consequence of inappropriate or ill-adapted legal intervention. Picking up again on the theme of legal pluralism I point to how a plurality of laws can contribute to these outcomes.⁵

Land, especially in the context of Vanuatu, also provides a useful illustration of the tensions between group rights and individual rights, and between rights and obligations. These are issues which are central to debates surrounding human rights, especially when presented in the context of western versus non-western points of view and as between powerful and less powerful national perspectives, but as I point out these are over simple binaries of opinion, especially where – as in Vanuatu, rapid changes in economic and social values are being experienced, so that while there are those who wish to adhere to traditional forms of land use, there are others who seek to engage with new opportunities and who may be attracted by greater individualism. Issues surrounding land use are also illustrative of some of the debates around third generation human rights, and the relationship between these, especially when it comes to the right to self-determination and the right to development. In the context of Millennium Development Goals, international trade imperatives (for example driven by the WTO), and aid donor agendas, the interrelationship of different forms of rights become significant, including the right to a sustainable environment. It is against the background of these wider concerns that this this publication examines issues relating to land, particularly land alienation, in Vanuatu to illustrate the very real dilemmas that confront obligations to satisfy social and economic rights and other human rights in developing countries.

In Publication 5, which is the third in this part, these dilemmas continue to be a key theme as does the role of aid donors. The main focus in this publication is, however, on the potential for instability triggered by land alienation. Delivered first as a conference paper focussing on „Property and Security’ this publication approaches

⁵ The potential for positive consequences arising from legal pluralism in developing countries has been considered by K. and F. von Benda Beckmann, 'The dynamics of change and continuity in plural legal orders' (2006) 53-54 *Journal of Legal Pluralism and Unofficial Law*, 1.

security in two ways: the need for security of tenure – and the corresponding differences of meaning of this for those holding land under customary tenure and those holding it under introduced forms of land tenure, notably leases; and security in terms of social and political stability at a local and national level, bearing in mind the proximity of Australia and New Zealand to Vanuatu, and the widely held view that Vanuatu is located in a Melanesian „Arc of Instability’⁶ – along with Solomon Islands, Papua New Guinea and Fiji.⁷ In this paper I suggest that maintaining an equilibrium between security of tenure for customary land owners and security of title for those holding leases is itself potentially conflictual and that either may trigger instability which has wider social, economic and political repercussions. To illustrate the possibility of land being the seat of instability I relate contemporary land issues to historic ones – some of which have been mentioned in Part One, in order to explain the causes and effects of some of the problems which are evident today. In particular, and because this was directed at a primarily Australian readership, I draw attention to the part played by Australia in Vanuatu’s affairs both pre- and post-independence. In the case of land this has been of particular significance in the first decade of the twenty-first century because of a number of aid-funded interventions. While present problems and tensions are attributable to a combination of factors, including for example, demographic trends in Vanuatu and lack of effective national land policies, if this publication is read alongside the one that precedes it, it is clear that there are issues in respect of: self-determination, the right to determine the pace and form of change and development and the exercise of sovereignty over resources for the long-term benefit of the nation and its people which are not being sufficiently addressed by current donor inspired and funded

⁶ See for example, R. J. May (2003), 'Arc of instability'?: Melanesia in the early 2000s' Macmillan Brown Centre for Pacific Studies and State, Society and Governance in Melanesia Project, Research School of Pacific and Asian Studies, the Australian National University; G. Dobell, „From “Arc of Instability” to “Arc of Responsibility”, (2012) 8(4) *Security Challenges* 33-45; D. Rumley, V. L. Forbes and C. Griffin (2006) *Australia's Arc of Instability: The Political and Cultural Dynamics of Regional Security*, Springer e-books.

⁷ These last three have seen considerably more instability than Vanuatu. For example, Fiji has experienced a number of coups, the most recent in 2006 and is still under a military dictatorship, Solomon Islands has experienced Australian intervention under RAMSI (Regional Assistance Mission to Solomon Islands) since 2003, and Papua New Guinea had many years of civil war in the 1990s prior to the secession of Bougainville.

initiatives, and until these concerns are addressed there remains the possibility of loss of security in more ways than one.

The final publication in this part, Publication 6, explores some of the fundamental conceptual differences regarding land and law that emerge on account of the plural legal system in Vanuatu. In particular this publication looks at the legal principles and assumptions that underpin the common law view of property which were implicitly introduced into the legal system under colonial influence and which remained part of the law on independence. In identifying common law principles of property as inappropriate legal transplants the paper emphasises the context into which these transplants were introduced.⁸ While this necessitates some repetition of material already encountered in the collection, given that the paper is based on a conference paper presented in the United Kingdom to an international audience, this was considered essential to demonstrate why I held the view that the commoditisation of land was potentially disastrous in the context of customary forms of land tenure in a developing country, and ought to be reconsidered in developed economies where reliance on using land as a market commodity had been shown to have such unfortunate economic consequences contributing to a global recession. Although based primarily on doctrinal research, this paper includes some empirical research notably observations and informal interviews which took place in 2007. In particular I was able to access material which I could not access outside the country, including a collection of children's views on land alienation submitted for a competition linked to the National Land Summit in 2006 – which I refer to in several publications in this collection. I found the views of this future generation of indigenous islanders poignant and perceptive and incorporated several examples in my original conference paper and in the publication included here. It was their views that prompted the title of this publication: 'Selling the land: should it Stop?'

⁸ The concept of legal transplants is well rehearsed among comparative lawyers, see for example A. Watson *An Approach to Comparative Law*, (1974) University of Georgia Press and P. le Grand, 'The Impossibility of Legal Transplants' (1997) 4 *Maastricht Journal of European and Comparative Law* 111. Even the World Bank concerns itself about such matters. See Law and Justice Institutions: Legal Transplants and Legal Culture, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20759640~menuPK:2035153~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last accessed 14/03/2013).

While the first part of this collection considered the period of Condominium rule and its aftermath, this second part has drawn attention to manifestations of new forms of colonialism illustrated by aid intervention and the involvement of outside agencies in policy formulation, administrative frameworks and law reform. The end of empire which disrupted the relationship between colonizer and colonised did not resolve the disparities of wealth and influence between developed and undeveloped countries and some have suggested that in fact decolonisation left the latter even further on „the margins of world order’.⁹ In the publications included in this part I have drawn attention to the complexity of factors which play a role in this post-colonial, global era, some of which are benign, some less so. A background paper to the AusAID Report Pacific 2020 (referred to above) states „Growth and poverty outcomes will depend ... on how well land tenures in the Pacific are adapted to emerging needs’.¹⁰ I have suggested in this part, particularly in Publication 4, that the ongoing process of change and development cannot be stopped but that caution should be adopted in deciding the pace and form of this change especially where this impacts of aspects of customary land tenure that have provided social and economic support for generations. In the final part of this collection I draw attention to other ways in which adaptations are being made.

⁹ R.F. Holland (1985) *European Decolonization 1918-1981*, MacMillan Basingstoke, 300.

¹⁰ AusAid (2005), Pacific 2020 Background Paper: Land’ 11.

Publication 3

‘Making Land Work in the Pacific? Evaluating Land Reform in Vanuatu’, (2009) *LAWASIA Journal* 44-61

'MAKING LAND WORK' IN THE PACIFIC? EVALUATING LAND REFORM IN VANUATU

Sue Farran*

1 INTRODUCTION

The aim of this article is to critically examine aid-funded intervention in matters relating to land in the South Pacific Republic of Vanuatu, an archipelago of around eighty islands that lie off the north-east coast of Australia, about three hours' flight from Sydney. The country is a popular haven for holiday-makers, attracts passing ocean-going tourist cruises and, for some, provides a tax-free haven where foreigners may retire or acquire second homes or a holiday villa.¹ For others, it is a place where they can set up businesses – often without the restrictive regulations of their home country. Vanuatu is also the home of around 240,000 indigenous people (*ni-Vanuatu*) who identify closely with the land and customs of their forebears. In rural areas in particular, traditional ways of doing things persist and even in urban areas customary values and practices are frequently called on to support claims or to resolve disputes. For these people, one of the central aims in attaining independence and ridding themselves of Anglo-French Condominium rule was to return land, which had been transferred to foreigners, back to the rightful customary owners.

The article starts by considering the background and recent policy papers that inform Australian involvement in land issues in Vanuatu, and then goes on to consider the practical intervention of aid funded projects in the country and the challenges these projects face in meeting the agendas of aid donors while, at the same time, addressing the concerns of ordinary people against a background of political instability, limited human and technical resources, and plural legal systems.² In particular, it questions the developments taking place in Vanuatu with a view to demonstrating that the agenda of aid donors may be diametrically opposed to that of indigenous customary land owners, and that unless compromise can be reached and bridges built, an unsatisfactory and potentially destabilising parallel system will persist, which has within it not only the dual strands of customary law and introduced law, but also the extra-legal phenomena of squatter settlements and the self-governance of expatriate communities.

2 BACKGROUND

In 2008 the Australian government, though its agency AusAID, published a document entitled 'Making Land Work'.³ The publication, which is in two volumes, not only provides valuable insights into various contemporary practices in the Pacific region,

* Senior Lecturer, Law School, University of Dundee; Visiting Lecturer, University of the South Pacific, Vanuatu.

¹ Vanuatu is tax-free as regards income tax, but residents pay heavily via indirect tax, especially on imported commodities.

² Australia is not the only aid donor involved. The United Nations Development Programme, New Zealand's NZAID and the World Bank all have a stake in the country. Indeed, one of the recognised problems in Vanuatu is lack of donor project coordination.

³ AusAID, 'Making Land Work' (2008) <http://www.ausaid.gov.au/publications/pubout.cfm?ID=3363_9223_6836_1452_8140&Type= at 27 December 2009.

based on commissioned case-studies, but also makes proposals for the future suggesting how present institutions and laws drawn from customary and introduced systems might be developed harmoniously. These suggestions include: creating legal mechanisms to recognise customary groups; formally recognising landowning groups through registration; facilitating leasing of customary land so as to fairly distribute the benefits to leaseholders and owners; establishing a regulatory and administrative framework that supports and assists landowners to negotiate with governments and investors, and supporting customary and formal dispute resolution fora to deal with land disputes.

While there is recognition in the document that land represents an important 'safety net' for many Pacific islanders and that many of these no longer enjoy security of tenure, the document is essentially Eurocentric in advocating that land policies and institutions must be reformed to promote social and economic development. While the document does not seek to be a blueprint for land policy reform, nor does it claim to necessarily represent Australian government policy, it has been published with a view to encouraging ongoing dialogue and debate on land policy reform. It seems highly probable therefore that AusAID is expecting Pacific island countries to sign up to this dialogue and debate and to consider incorporating these ideas into land strategies that rely on or require aid funding.

AusAID has also published a document entitled 'Pacific 2020'.⁴ This identifies a number of major challenges facing the region including poor economic growth, unemployment, poverty, frustration and potentially social instability. Environmental and health issues are also a concern. 'Pacific 2020' sees rapid economic growth as the only viable option for the future of Pacific islands if they are to meet the challenges that face them. Among other identified constraints to long-term growth are land tenure and political governance. The report suggests that regulatory barriers should be reduced, while protection of property rights is strengthened.

While the report recognises that land tenure reform is a sensitive issue, it maintains that such reform is imperative. However, it wants this reform to do two things: encourage economic growth and promote social stability. It sees the dual system of communal or group customary ownership coupled with individual leaseholds as the way of doing this, supported by improved recording of land rights; a cost-effective framework for land dealings; an efficient land dispute process; and improved land administration. It advocates the long lease as a means of protecting customary groups and giving individuals the security they need for investing in land development.

Arguably, it is precisely this dualism that threatens customary land rights in Vanuatu. Multi-generational leases and uncertainty as to who will be entitled to the land and/or its improvements at the end of the lease are fundamental problems, as is the management of income generated by leases and the conflict between those who want to lease the land and those who wish to retain it for communal use. Under customary law, decision making may be a drawn-out process involving much discussion and the involvement of many people representing the different interests affected by the land. These processes may be inimical to fast and efficient land alienation by individuals and anonymous corporations,

⁴ AusAID, 'Pacific 2020' <<http://www.ausaid.gov.au/publications/pdf/pacific2020.pdf>>. The Report stresses that it is not "an action plan", but rather a call to action for Pacific governments and aims to provide these with guidelines and ideas. In 1993, a similar report entitled 'Pacific 2010' was produced.

epitomised by modern developments in electronic registration, state-of-the-art land surveying and e-commerce, including e-conveyancing. Moreover, customary disputes may be short-circuited by the Minister of Lands exercising legislative powers to deal with land where title is disputed and, in many cases, approving leases over the heads of the disputants.

Coincidentally, fortuitously or unsurprisingly, at the same time as Australia was articulating these concerns, land issues were looming large in Vanuatu. There had been gradual but growing awareness of poor land management by the central government and private individuals and, in particular, the escalating alienation of land under lease, often to non-indigenous buyers. These concerns had initially been highlighted at public conferences held on the Port Vila campus of the University of the South Pacific, the first in 2002, and also through articles in the media and public awareness-raising by Wan Smol Bag theatre company, including radio broadcasts and a video entitled 'A Piece of Land'.

These non-government initiatives were subsequently matched by government ones. In its Comprehensive Reform Program Matrix 2004-2006,⁵ the Vanuatu government highlighted "reform of the land law system to minimize uncertainty about land tenure and facilitate better land use." Proposed measures included the gazettal of a *Customary Land Act* and the implementation of measures to achieve a "safe, healthy and sustainable environment." In 2006, the Vanuatu government issued its response to development challenges in its 'Priorities and Action Agenda 2006-2015: An Educated, Healthy and Wealthy Vanuatu'.⁶

The Pacific Islands Forum Secretariat also articulated its concern about land issues in 2008, in a paper entitled 'Customary Land Management and Conflict Minimisation – Guiding Principles and Implementation Framework for Improving Access to Customary Land and Maintaining Social Harmony in the Pacific'. Matters pertaining to land – and its related resources, sustainability, stability and social equity – are therefore widely recognised in the region as key to the future prosperity of Pacific island people. There may be rather less consensus on what these mean and in particular how they are to be achieved.

In 2006, national and donor concerns regarding land culminated in a National Land Summit, which was preceded by a number of provincial 'mini-summits'. The purpose of this first round of meetings at local level was to elicit the views and opinions of 'grassroots' representatives,⁷ to raise awareness of land issues, and to inform the cumulative national summit. This was held in the capital, Port Vila, in September 2006 and its outcomes were reflected in a Final Report published with the assistance of AusAID in 2007.⁸ In particular, the Summit arrived at twenty resolutions that representatives believed needed urgent consideration. Broadly grouped, these concerned

⁵ Department of Strategic Management, 'Comprehensive Reform Program Matrix 2004-2006' <http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/vanuatu/CRP_MATRIX_%2004-2006.htm>.

⁶ Department of Economic and Sector Planning, Ministry of Finance and Economic Management, 'Priorities and Action Agenda 2006-2015: An Educated, Healthy and Wealthy Vanuatu' (2006) <http://www.ausaid.gov.au/publications/pdf/vanuatu_agenda.pdf>.

⁷ 'Grassroots' is a term used to refer to ordinary people, particularly in rural areas.

⁸ S Tahī, 'National Land Summit, 25-29 September 2006, Final Report' (2007).

questions surrounding ownership of land; concerns about fair dealing in land and issues regarding sustainable development.

The resolutions were considered and approved, with some minor modifications, by the Council of Ministers.⁹ A National Land Steering Committee was formed early in 2007 and the Vanuatu government undertook to seek funding. This was secured from Australia and New Zealand.¹⁰ An initial AusAID funded review was published in March 2007.¹¹ In June 2008, the National Steering Group organised a stakeholders meeting to implement the 2006 resolutions, where it was acknowledged that AusAID was assisting with the design of a five-year land programme, although the then Director of Lands was keen to point out that "this is a program for Vanuatu [...] It is not a program by donors and Vanuatu decides what the design can and can't do, not donors."¹²

Following this, further tenders were put out for aid-funded consultancies to address land reform initiatives identified as necessary in the review and for which the review had prepared scoping notes.¹³ Broadly, a plan staged over two five-year periods was proposed. Even if this is implemented on schedule, it is unlikely that the major concerns raised at the National Land Summit in 2006 will be fully addressed before 2029-30.¹⁴ Given that Vanuatu has an average population-growth rate of 2.6%, rising to 4.2% in urban areas;¹⁵ that the estimated 2009 population is 218,519 of whom 30.7% are under the age of fourteen;¹⁶ and that the only thing that appears to be slowing down land alienation and development is the current global economic climate, this time-frame may well deliver too little, too late.

3 VANUATU: A PACIFIC EXPERIMENT?

The document 'Making Land Work' claims not to be prescriptive. The purpose is to encourage debate. It recognises that Pacific island countries are subject to rapid change which threatens the security of customary land tenure. It highlights the importance of governments having clear land policies in order to deal with present issues and be ready

⁹ One of the more significant of the Council's modifications was to provide exceptions to the proposed absolute curtailment of the Minister of Land's powers.

¹⁰ New Zealand funded a new database programme for land lease records and is addressing issues relating to the *Customary Lands Tribunal Act 2001*. Pacific countries and their donor partners are broadly governed by the principles of the 2005 *Paris Declaration on Aid Effectiveness*.

¹¹ Chris Lunnay et al, 'Vanuatu: Review of National Land Legislation, Policy and Land Administration' (2007) <http://www.ausaid.gov.au/publications/pdf/vanuatu_land.pdf>.

¹² 'Five-Year Land Program to Implement Resolutions From 2006 Land Summit', *Vanuatu Daily Post* (Port Vila), 22 September 2008. This Director was suspended from his post by the Minister of Lands in June 2009, purportedly for refusing to approve an illegal land deal for the new Minister of Lands: private communication on file with the author. The matter is now with the Public Service Commission.

¹³ They included, for example, review of the *Strata Title Act 2000*, proposals for sub-division controls and the protection of foreshore reserves, an audit of compliance with the *Land Leases Act 1984*, a zoning map for Luganville and the raising of public awareness.

¹⁴ This calculation is based on the fact that the Vanuatu government only published its draft Land Sector Framework proposals in May 2009.

¹⁵ Vanuatu National Statistics Office, 'Demographic Indicators' <<http://www.spc.int/prism/Country/VU/stats/SOCIAL/DEMOGRAPHY/demog-sum.htm>> at 23 July 2009.

¹⁶ Central Intelligence Agency, 'The World Factbook' <<https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html>> at 29 December 2009.

for future ones. It also recognises that 'one size will not fit all.' Among the key principles for land policy reform it includes "intervene only if it is necessary."¹⁷

However, since the 2006 National Land Summit, AusAID has dedicated considerable sums to land reform in the country. There have been at least two major consultancies put out to tender with more due in 2009-10. Perhaps of greater concern have been two developments. The first is that under the 2005-10 Australia-Vanuatu joint development co-operation strategy document, three things are agreed: improved governance; raised productive capacity; and improved service delivery. The second is that AusAID has assisted in the formulation and drafting of the Land Sector Framework statement which was meant to be submitted to the Council of Ministers at the end of 2008.¹⁸ The two are closely interrelated, and it is clear that many of the key principles identified in the 'Making Land Work' document are incorporated into the Vanuatu Land Program Design document and inform the joint development co-operation strategy agreed between Vanuatu and Australia for 2005-10.

The Land Sector Framework document, at least in draft, includes five thematic areas which incorporate the themes of the joint-development strategy document. These are: enhancing the governance of land; engaging customary groups; improving the delivery of land services; creating a productive and sustainable sector; and ensuring access and tenure security for all groups. The Framework also outlines a multi-stakeholder governance structure for land development with a representative committee which, it is proposed, should play a key role in policy, strategy, planning and donor coordination as well as providing oversight for the implementation of land reform policies and an evaluation of these.

The shape of these developments is of concern for a number of reasons. First, the land concerns of indigenous *ni-Vanuatu* were clearly articulated in the resolutions which emerged from the 2006 National Land Summit. They do not need to be articulated by aid donors. What they do need is action by government. To date, this action has not been forthcoming and it is doubtful whether the proposed aid projects will come even near to addressing the majority of these resolutions in the near future.¹⁹ Of particular concern is the failure of government to implement the moratorium on sub-divisions resolved at the National Land Summit; the failure to curtail the powers of the Minister of Lands to manage land where title is disputed; failure to regulate those practicing as estate agents and valuers; and failure to ensure that lease negotiators purporting to represent customary owners actually have the support and approval of all the customary interests vested in the land. Moreover, at present the population of Vanuatu has to rely on the press to learn what developments are proposed and what stage the proposed reform projects have reached. For many in rural areas, access to basic information is lamentable.

¹⁷ AusAID, above n 3, vol 1, xv.

¹⁸ As of April 2009, this statement existed in draft but had yet to go out for consultation prior to submission to the Council of Ministers. It was not clear who was going to be consulted.

¹⁹ On 1 May 2009, the *Vanuatu Daily Post* carried a letter to the Editor from the National Lands Secretariat representative responding to public frustration at delays. This triggered considerable further correspondence. See William Ganileo, 'Land Progress in Vanuatu after the Land Summit' *Vanuatu Daily Post* (Port Vila), 1 May 2009 <<http://www.dailypost.vu/ArticleArchives/tabid/56/articleType/ArticleView/articleId/4449/categoryId/13/Re-Land-progresses-in-Vanuatu-after-the-land-summit.aspx>> at 29 December 2009.

Second, and linked to this, is a process of reinterpretation and misinterpretation – a form of donor driven 'Chinese whispers'. Each aid-funded review – which is invariably undertaken by a predominantly non-indigenous team, although there may be some local contact or input – re-invents and re-shapes the issues. This process is aggravated by the fact that tender bids have to be hedged in 'bid-jargon'; the competitive nature of bidding results in secrecy surrounding various key documents and scoping information; there is limited grass roots input and frequently the local contact point is the same person or persons each time; field studies or empirical research to inform donors is cursory, geographically limited and often of poor quality; and there is a lack of transparency about the policy agenda of donors.

Third, as indicated by the above proposal for a multi-stakeholder committee, a number of these proposals envisage the setting up of non-democratically elected bodies to inform and shape fundamental policy which affects the lives of all citizens. Two examples suffice. The first is that increasing emphasis is being placed on the role of the *Malvatumauri* (National Council of Chiefs). The second is that considerable power, and funding, is being vested in the National Cultural Centre.

3.1 Strengthening the Role of the National Council of Chiefs

The Constitution provided for a National Council of Chiefs (*Malvatumauri*) with a general competence to "discuss all matters relating to custom and tradition."²⁰ A number of the Land Summit resolutions envisage an important role for the *Malvatumauri*. These include working with government and provincial councils to help people document customary land law and working with the Cultural Centre and government to raise public awareness about customary economies, land law and customary laws. The Steering Committee established after the Summit included representatives from the *Malvatumauri*, and the 2007 Review team consulted with them in formulating its report. Indeed, it would be unconstitutional not to involve the National Council of Chiefs in any proposals leading to a national land law.²¹ The 2007 Review team recommended building the capacity of the National Council of Chiefs, especially as regards the raising of public awareness, strengthening the customary land tribunals, demarcation of land boundaries and supporting legislation.

The *Malvatumauri*, however, is not a unified body, and although it exists at national level, its powers are weak. It is supplanted at island level by the island council of chiefs, for example the Efate *Vaturisu* Council, and at local level by village chiefs. The extent to which these local councils are either prepared to engage with the land summit resolutions or able to do so is also variable. The *Vaturisu*, for example, drew up a code of customary land law in 2007. A previous code of customary law also exists for Tanna. However these codes have no formal legal authority. In any case, there is a difference between customary land law and the role of chiefs. While chiefs may be knowledgeable in the laws and customs of their people, they do not make the law. Their role is to adjudicate disputes and encourage settlement. While customary law is oral, it is increasingly being committed

²⁰ Constitution of the Republic of Vanuatu, art 30.

²¹ Constitution of the Republic of Vanuatu, art 76.

to writing in the form of law reports.²² It is evident from a reading of these that the actual customs which determine land rights are rarely in dispute. What is litigated is entitlement based on questions of fact.²³

There is also the problem that, although the *Malvatumauri* has now been placed on a legislative footing,²⁴ the Act is descriptive of procedure and administration rather than substance. Indeed, it has been described as “a dog that had had all its teeth removed as all the powers the *Malvatumauri* had wished to be included had been amended out of it – and yet the dog was still expected to go and hunt pigs.”²⁵ In particular, there is the problem that while chiefs may be seen as custodians of customary law, they are not integrated in the legal system as legal authorities. Although disputing customary land owners are encouraged to settle their disputes out of court, according to custom, a chief or any other non-judicial body – including the Minister of Lands – cannot make a final ruling on customary land ownership and therefore the matter is likely to be reopened and contested.²⁶

On the one hand, land matters must be decided according to customary law, but on the other the courts need only take such law into account where there is no other law which applies.²⁷ While the Constitution states that Parliament may make provisions to establish what customary law is, it has not done so. Consequently, while chiefs have both knowledge and power, their actual competence is unclear. There is, moreover, uncertainty as to whether the constitutional reference to the application of customary law to land applies to non-indigenous residents.²⁸

3.2 The National Cultural Centre

The National Cultural Centre is established under the auspices of the National Cultural Council, a statutory body set up under the *Vanuatu National Cultural Council Act 1988* (Cap 186), the primary objects of which are:

- (a) to support, encourage and make provision for the preservation, protection and development of various aspects of the cultural heritage of Vanuatu; [...]
- (c) to support, encourage and make provision for the establishment, maintenance and development of public libraries; [and]

²² There are, for example, around two hundred Customary Land Tribunal reports held in the Department of Lands. Other reports can be found through the Pacific Islands Legal Information Institute (PacLII) <www.pacii.org>.

²³ The matters up for determination might include whether a person is of a particular bloodline or adopted; whether certain physical features such as stones were placed by the claimant's ancestors or others; and so forth.

²⁴ *National Council of Chiefs Act 2006* (Vanuatu).

²⁵ Chief Selwyn Garu, Secretary of the *Malvatumauri*, quoted in Miranda Forsyth, ‘Report of the Vanuatu Judiciary Conference 2006’, available at <www.pacii.org>. An example can be seen in the decision of *Port Vila Town Island Council of Chiefs v Tahi* [2008] VUSC 21, in which it was held that the *Malvatumauri* had no power to disband the Port Vila Town Island Council, even though it had the power to register the body.

²⁶ See *Valele Family v Touru* [2002] VUCA 3.

²⁷ *Constitution of the Republic of Vanuatu*, art 47(1).

²⁸ There is some evidence to suggest that it does, on the grounds that after independence Vanuatu had one law for all its people, abolishing for once and for all the ‘optants’ system or the idea of election. See the judgment of d’Imécourt CJ in *Banga v Waiwo* [1996] VUSC 5.

(d) to establish, maintain, administer and make provision for such national institutions as the Council shall consider necessary and appropriate for the purposes of its objects [...]²⁹

Originally, the agencies to advance these objectives were envisaged as being the National Museum, the National Library and the National Archives. In 1995, the Act was amended to include "the Vanuatu Cultural Centre, including the National Museum, the National Library, the National Film and Sound Unit and the National Cultural and Historic Sites Survey; and [...] the National Archives."³⁰ The Director of the Vanuatu Cultural Centre is a member of the National Council.

While customs relating to land are arguably part of the national heritage and the Cultural Centre has a valid role in recording, preserving and raising awareness of these – as indeed envisaged in Resolution Three of the National Land Summit³¹ – it is questionable whether the mandate of the Act was intended to extend to involvement in government policy in land, or related matters.³² The difficulty is that while there is frequent reference to custom and customary stakeholders in the policy documents of aid donors and government, the appropriate and representative fora for facilitating participation and the dissemination of information are lacking.

There is also something of a moral dilemma raised by the involvement of the Cultural Centre, directed as it is to the preservation of tradition, demonstrated for example by its advocacy of *kastom ekonomi*,³³ in issues which are at the forefront of development, monetary investment and the raising of GDP. From the perspective of aid donors it may be considered that the Cultural Centre satisfies the need for 'grassroots' input and local credibility. Certainly, the Centre is able to provide valuable resources in terms of field officers to ascertain what customs prevail in the various areas of Vanuatu. However, it is questionable whether a Centre located in the capital and very distant from many people, with a limited outreach programme, is truly representative in any way and indeed its prominence in recent years may be more attributable to the visibility of its director than its suitability for this particular role.³⁴

4 OUTSIDE THE AID BOX

The above issues are matters of concern, but there are two major issues which neither the government nor the aid donors appear to be addressing. The first is the problem of informal or squatter settlements which fall outside the reach of either customary land tenure or introduced land law, and the second is the emerging number of incidents which

²⁹ *Vanuatu National Cultural Council Act 1988* (Cap 186) (Vanuatu) s 5.

³⁰ *Vanuatu National Cultural Council Act 1988* (Cap 186) (Vanuatu) s 5(d).

³¹ This Resolution provides that the Government, the National Council of Chiefs and the Cultural Centre should assist the people (Chiefs, schools, men and women) to be aware of traditional economy, existing land laws, customary laws and fair dealings.

³² For example, an officer of the Cultural Centre is involved in an aid funded review of the operation the *Customary Lands Tribunal Act 2001*.

³³ A program of reviving and revitalising an exchange economy which encourages sustainability and self-reliance and eschews money, individualism and the private accumulation of wealth.

³⁴ This is exemplified by Ralph Regenvanu, the former Director of the Centre and now a member of Parliament, whose father, Sethy Regenvanu, was closely involved in the formulation of land policy for the newly independent republic.

suggest that expatriate residents in Vanuatu are, in a number of respects, able to conduct their lives beyond the reach of the law.

4.1 Informal Settlements

Urban drift in Vanuatu is a major concern, especially to the capital, Port Vila. It is estimated that around two-thirds of the urban population is based here (approximately 41,050 people),³⁵ many of whom are second or third generation urban dwellers. Many live in squatter settlements where basic amenities are minimal, drugs and alcohol abuse increasingly a matter of concern, and violence commonplace.³⁶ Tenure is insecure, with many residents either tenants at will or licensees who may find themselves evicted from their properties at short notice and at the whim of the land owner.

Many of those in squatter settlements are unemployed and opportunities for employment are very limited. Moreover, informal settlement is not limited to residence but includes cultivation of land, so that increasingly, in order to feed themselves and their families and perhaps to make some cash through the sale of excess produce, land on the periphery is being cleared and cultivated for fruit and vegetables. The theft of food crops is becoming commonplace. As subdivision and development increase this garden land is lost.

Access to the natural resources of the reef and sea-shore is also being curtailed as beaches and coastal areas are fenced off, privatised by developers and polluted by storm water run-off, raw sewage and erosion. Yet aid donors have shown little interest in researching the needs and aspirations of those in squatter settlements. While there are calls for better zoning and land use control, little consideration has been given to the impact of such measures on these settlements or what is to be done about the people in them. At the same time, attempts to evict illegal squatters on land that has been sub-divided or alienated under a legal lease can have a number of negative consequences, both for the squatters and the investor who hopes to develop the land or the customary owner who intends to alienate the land under a lease.³⁷

4.2 Beyond the Reach of the Law?

The idea of white settlers in Pacific islands being beyond the reach of the law is nothing new. Indeed, in the early days of settlement in Vanuatu it appears that a number of French and British settlers were without a legal regime, and the occasional visits by naval commanders hardly addressed this. Even when the New Hebrides came under the control of the Anglo-French condominium government, there were still settlers who could fall outside any law, having failed to 'opt' for one of the two possibilities available to non-natives: the British or French laws.

³⁵ Vanuatu National Statistics Office, '2006 Census of Agriculture - Preliminary Report' (2007) <www.spc.int/prism/Country/VU/stats/P_releases/Adhoc/Agcensus_rept.htm> at 24 September 2009.

³⁶ For comment on the potential instability in urban areas, see J Mitchell, 'Violence as Continuity, Violence as Rupture - Narratives from an Urban Settlement in Vanuatu' in S Dinnen and A Ley (eds), *Violence in Melanesia* (2000) 189, 191.

³⁷ For examples of the problems raised between custom owners and squatters, see *Simeon v Family Rakom* [2004] VUSC 45 and *Dinh v Kalpoi* [2005] VUSC 10. In both cases, a number of families were squatting on land which they did not own. There is no record of where the removed squatters went after losing their claims.

Although there was some uncertainty as to which laws applied post-independence, it was held that residents could no longer choose whether to fall under French or British law, and that all laws applied to everyone.³⁸ However, there is still uncertainty as to whether and to what extent customary law applies to non-indigenous people, especially in respect of land. Although the Constitution states that "the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu"³⁹ – suggesting that all land, however enjoyed and by whom, is to be governed by customary law – the failure of government to implement the steps indicated under subsequent articles leaves this in doubt. Of particular relevance is the failure of "Parliament, after consultation with the National Council of Chiefs, [to] provide for the implementation of Articles 73, 74 and 75 in a national land law and [...] make different provision for different categories of land."⁴⁰ While some of the provisions in the *Land Leases Act 1988* (Cap 163) could cover various customary interests, such as overriding interests, easements and profits,⁴¹ it is by no means certain if this legislation, which applies to the customary land owner and the non-customary tenant or leaseholder, would convey the same meanings to both parties.⁴²

There is also uncertainty as to whether, and to what extent, contracting parties can oust customary law or the protective provisions of statutes under a general freedom of contract. While the provisions of the Constitution cannot be excluded, the *Land Leases Act 1988* appears to anticipate freedom of contract,⁴³ and provided consents are not obtained by fraud or mistake and the procedures for registration are complied with, then parties may agree to whatever terms they like. Indeed, the National Land Summit found that often customary owners had very little understanding of what a lease was, what its terms meant or whether these were fair. It is therefore open to the stronger party to impose terms which are favourable to that party. In many cases, this is the expatriate developer or investor rather than the customary land owner. Where the Minister of Lands represents the custom owners because ownership is in dispute or unascertained, it is questionable whether the Minister is too concerned about the small print of the contract despite the constitutional duty imposed on the state under Article 79 to only approve the alienation of land where it is in the interests of the customary owners to do so.⁴⁴

³⁸ *Banga v Waiwo* [1996] VUSC 5.

³⁹ *Constitution of the Republic of Vanuatu*, art 74.

⁴⁰ *Constitution of the Republic of Vanuatu*, art 76.

⁴¹ *Land Leases Act 1988* (Cap 163) (Vanuatu) s 17.

⁴² See Kenneth Brown, 'The Language of Land: Look Before You Leap' (2000) 4 *Journal of South Pacific Law* <www.paclii.org/journals/fjspl/vol04/>; Sue Farran, 'South Pacific Land Law: Some Regional Challenges, Cases and Developments' (2001) 32 *Victoria University of Wellington Law Review* 953.

⁴³ See, for example, *Land Leases Act 1988* (Cap 163) (Vanuatu) s 40: "Save as otherwise expressly provided in the lease and subject to any written law there shall be implied in every lease the following agreements [...]". Elsewhere, however, it would seem that freedom of contract can be overridden. For example, s 39(1) states: "Notwithstanding anything to the contrary contained in any lease, the rent reserved under all leases may be reviewed in accordance with the provisions of this section [...]".

⁴⁴ Article 79 states that "land transactions between an indigenous citizen and either a non-indigenous citizen or a non-citizen shall only be permitted with the consent of the Government" and that such consent cannot be given if "the transaction is prejudicial to the interests of (a) the custom owner or owners of the land; (b) the indigenous citizen where he is not the custom owner; (c) the community in whose locality the land is situated; or (d) the Republic of Vanuatu".

It is also clear that where parties have the benefit of legal counsel, are more educated and literate and have financial resources, they may either be able to exploit loopholes in the law with impunity or carry on their activities without great inconvenience by paying the fines or penalties levied where statutes are enforced.⁴⁵ By acting in concert, they may even be able to operate in a totally unregulated or weakly regulated environment.⁴⁶ This is what estate agents are doing in Vanuatu. Although these business have to be registered, and work/residence permits will only be issued to those who either can demonstrate that they have the required sum invested in Vanuatu or are employed by a recognised employer, their practices are essentially unregulated.

This of course has been a problem in a number of countries, where over the years estate agents and property developers have acquired a bad press. The problem is aggravated where much of the advertising is done on the internet and where clients may be geographically scattered, perhaps visiting Vanuatu for a holiday or simply to look at property identified at a distance. The Land Summit identified the practices of estate agents and property developers in Vanuatu as a matter of concern. To date, however, the government has done nothing about this and it is highly unlikely that those involved in the business will voluntarily adopt a code of practice to self-regulate their activities. Indeed for those who have escaped the closer scrutiny that the industry has come under from elsewhere, Vanuatu must seem like a honey-pot.

Troubling as this is, of more concern perhaps is the self-help mentality being evidenced by the property security measures being taken by expatriate residents. Increasingly, properties are becoming gated communities with barriers and security guards on the access roads, razor wire, guard dogs and electric gates surrounding the properties and 'keep-out' notices displayed on barbed wire fences along beaches, agricultural land and access to inland water. There have, from time to time, been calls for vigilante patrols and the exercise of self-help measures in policing.⁴⁷

These reactions are in part prompted by the insufficiency and frequent inefficiency of the national police – despite years of donor funding to improve performance – poor security at the national prisons and weak correctional services. However, they are also a reaction to a general lawlessness and tension which is being aggravated by increasing urban migration; rising numbers of unemployed people, especially young adults; severe and very visible disparities of wealth, and the increasing ghettoisation of indigenous and non-indigenous people. In effect, an economic apartheid is taking place which reflects social and economic inequities and suggests that the problems of sustainability, inter-

⁴⁵ See, for example, the case of *Kakula Island Resort Ltd v Government of the Republic of Vanuatu* [2006] VUSC 233, where the defendants were fined VT 745,316,344 for entering the land without the consent of the developers to ensure compliance with an environmental impact audit required under the *Environmental Management and Conservation Act 2002*. The order against the government was subsequently set aside: *Government of the Republic of Vanuatu v Kakula Island Resorts Ltd* [2008] VUCA 5.

⁴⁶ For example, a fine of a mere VT 200,000 for infringing the *Foreshore Development Act 2006* (Vanuatu), s 6. For an illustration of the weakness of legal safeguards, see *Ozols v Cylcamen Ltd* [2002] VUSC 18.

⁴⁷ See for example, the Letter to the Editor entitled 'The Ever Increasing Crime Rate', *Vanuatu Daily Post* (Port Vila), 21 December 2007, and the subsequent Editorial, 'Crime is Out of Control – It's Time to Stop the Talk and Act', *Vanuatu Daily Post* (Port Vila), 12 January 2008. It should be noted that the victims of crime are certainly not limited to expatriate residents and visitors.

generational justice and the right to exercise sovereign control over the use and management of land and its resources are not the concern of expatriate residents.

5 BUILDING BRIDGES

The focus of 'Making Land Work' is reconciling customary land and development. This in turn is interpreted as creating links between customary land tenure and formal (introduced) land institutions. Consequently, much of the rhetoric found in the current proposals regarding land in Vanuatu is that of building bridges between customary land tenure and introduced land tenure, for example leasehold and strata title. The problem is that the user of a bridge rarely has a say in its design or structure. That power lies with the engineer and the person who pays for the bridge.

Thus, it is suggested in the AusAID document that legal mechanisms are created to recognise customary groups; that customary land ownership is recognised by registration; that leasing is facilitated in ways which distribute the benefits fairly between landowners and leaseholders; that there are regulations and institutions which support and assist custom owners in negotiating such leases; and that customary and formal dispute resolutions are supported.⁴⁸ This presupposes, however, an environment in which membership of customary groups is certain and capable of documentation rather than fluctuating and flexible; where indefeasibility of title through registration is acceptable to both sides; that the bargaining power of parties to a contract is equal and informed by the same concerns; that there is nationally available access to justice, to information and to legal advice; and that formal and informal dispute forums are mutually compatible and dovetail neatly into one and other.

Even if these naive assumptions are not made, the involvement of overseas consultants can lead to a process of legal assimilation or unconscious acceptance of transplant, so that even when proposals apparently come from agencies within the country, there may be limited critical analysis whether a proposed concept or institution will work or whether it confers any real benefits, and to whom. For example, the National Council of Chiefs has proposed an Ombudsman Committee;⁴⁹ another suggestion has been a specialist land court, both of which are introduced concepts. On the face of it these seem sensible possibilities. On closer examination, they are flawed.

5.1 An Ombudsman Committee

Vanuatu already has an Ombudsman established under the *Ombudsman Act 1998*,⁵⁰ as well as a *Leadership Code Act 1998*. Indeed, in the past, the Ombudsman has produced a number of reports relevant to land matters, in particular the abuse of power by senior

⁴⁸ AusAID, above n 3, xii.

⁴⁹ National Council of Chiefs of Vanuatu, 'Recommendations to the Lands Summit, September 2006' <www.vanuatuculture.org/documents/Land%20Summit%20Recommendations.doc> at 6 January 2010. See also Ralph Regenvanu, 'Issues with Land Reform in Vanuatu?' (2008) 12 *Journal of South Pacific Law* 63, 66-7.

⁵⁰ This Act represents a weaker version than the original *Ombudsman Act 1995*, which was repealed by the *Ombudsman (Repeal) Act 1997*.

political figures.⁵¹ At present, and as a result of amendment to the original legislation, the Vanuatu Ombudsman has limited powers to make enquiries and publish reports. He or she cannot instigate prosecutions. The model of a committee rather than an individual performing the role of the Ombudsman is however found in Papua New Guinea, which has a commission. This has a number of advantages as it reduces the likelihood of personal attack on the Ombudsman by those into whose actions or conduct enquiries are being made. The commission is also in a strong legal position as it is regulated by its own organic law which is not susceptible to repeal by parliament – as has happened in Vanuatu.⁵²

While the scope of an Ombudsman as a 'watchdog' can certainly be a useful way of calling ministers, government departments and officials to account, this usually operates retrospectively. Therefore, such a body would need to be empowered to be proactive rather than merely reactive, and to be given the authority to take matters directly to court, the police or other responsible enforcement bodies. Unfortunately, it is often a challenge in small jurisdictions to ensure sufficient distance between ombudsmen and others, and the issue of resourcing from the national budget and the need for the co-operation of those individuals or departments under scrutiny often means that the work of the Ombudsman is frustrated, sometimes deliberately.

5.2 A Land Court?

Although there are land courts in the region, for example in Samoa, where custom is not homogenous and where the acquisition of title is open to debate, it is difficult to see how land courts would succeed in Vanuatu where the Customary Land Tribunals, and prior to them the Island Courts, have failed.⁵³ Experience from elsewhere in the region also suggests that local land courts have a high rate of appeal, leading to backlogs in the system.

Constitutional constraints would require that any such court would have to rule according to custom and the type of problems currently besetting the Customary Land Tribunals would be likely to arise in terms of the composition of a land court and the evidential challenges of establishing custom. Moreover, in the face of changing land use and development, there may be an increasing tendency for custom either to be rejected or its application failing to resolve land disputes because, first, not everyone accepts custom – or at least the same versions of custom – and, second, land use is changing in a way that removes disputes from the traditional realm of custom.⁵⁴ Further, if a land court is to be

⁵¹ See, for example, *Alleged Mis-Allocation of a Land Lease in Luganville* [2003] VUOM 6; *Misappropriation of Land Fees and Delay in Reimbursing Excess of Land Fees by Lands Officer in Santo* [2002] VUOM 6; *Granting of Leases by the Former Minister of Lands Mr Paul Telukluk to Himself, Family Members and Wantoks* [1999] VUOM 6; *Breaches of the Leadership Code by Sato Kilman, Minister of Lands* [1998] VUOM 5.

⁵² See A Jonge, 'Ombudsmen and Leadership Codes in Papua New Guinea: Keeping Government Accountable in a Rapidly Changing World' (1998-1999) 20 *Melanesian Law Journal* 139; R Lal, 'The Diversified or Strict Role of an Ombudsman: A Comparison in the Roles of the Ombudsman in Vanuatu and Fiji' (1997) 1 *Journal of South Pacific Law* 1.

⁵³ The Customary Lands Tribunals are currently subject to their third review since being set up in 2001. See, for example, L Lini, 'Land Tribunal Review Ends', *Vanuatu Daily Post* (Port Vila), 4 October 2008.

⁵⁴ A Jowitt 'Indigenous Land Grievances, Customary Land Disputes and Restorative Justice' (2004) 8 *Journal of South Pacific Law* 21.

the court of final appeal, there is the likelihood that appeal by way of judicial review will become a way of accessing the formal court system; alternatively, the land court itself will be increasingly assimilated into the formal, introduced system, for example by tightening rules on procedure and evidence and allowing representation by lawyers, so that the role of custom will become increasingly weak.

5.3 The Short Term Land Reform Program

The aid-funded short term land reform program has also come up with a number of potentially good ideas which may or may not work in Vanuatu. For example, research into access to the sea-shore has produced a proposal of a twenty metre buffer zone measured from the mean high water mark.⁵⁵ However, in long thin islands this will be impractical and will need to be modified, while where coastal development has already taken place – as around most of the island of Efate – it is highly unlikely that this buffer zone will be implemented retrospectively. At the outset, therefore, it would appear that even if this measure is implemented there will be variations and exceptions, opening the door to negotiations and possibly avoidance.

Similarly, considerable resources have gone into digitalising paper records of land leases and land plans. While this may bring Vanuatu's land register into the twenty-first century, it currently means that many existing paper records are unavailable for scrutiny, because they have been moved off shelves and into boxes awaiting processing; that there is a huge backlog of registration, leading to insecurity of leases; and that little consideration has been given to the possibility of technical breakdown due to poor maintenance, natural disasters or human error – for which the Government of Vanuatu may not be prepared to offer the guarantees and compensation mechanisms found in many countries with systems of compulsory registration.

5.4 Re-Designing the Bridge

In every case, the assumption seems to be that the existing introduced law should be the foundation of future development. So the question is not 'are leases as a legal concept suitable for this country?', but 'how can we improve security of tenure under a lease, and how can we make customary owners understand what a lease is?' However, it would be equally viable to adopt an approach which asked what customary arrangements – of which there is plenty of evidence in land claims heard by the Islands courts and the Customary Land Tribunals – could facilitate the accommodation of non-customary owners. Similarly, it might be asked, how does customary land tenure accommodate the shared use of common resources such as the sea-shore and reef, or how does customary law regulate the lay-out or planning of a village, or sanction breaches of anti-social behaviour or land misuse?

Such an approach is not entirely novel. Increasingly, for example, the South Pacific Community is advocating traditional forms of fish and marine management to secure the sustainability of resources. Similarly, it might be worth considering what traditional customary devices are used to ensure inter-generational land equity, in a country where there is virtually no social security or state-provided welfare for those who cannot feed

⁵⁵ Ganileo, above n 19. In a subsequent Letter to the Editor, the same author refers to a twenty-five meter buffer zone: *Vanuatu Daily Post* (Port Vila), 26 May 2009.

themselves,⁵⁶ and how bridges can be built between custom rights of use, occupation and cultivation, and access to mortgage finance, investment funds or development loans.⁵⁷

It should also be recognised that concepts which may work elsewhere do not always operate in the same way once transplanted. Take the example of registration, which is frequently advocated as a panacea for certainty and security of tenure. In Vanuatu, leases have to be registered, whereas customary title does not. The certainty intended by the process of registration provides security of title to the person who is registered, but the process may equally undermine certainty of title of customary owners, especially where title is registered without sufficient attention to customary claims or pending disputes.

Although the Supreme Court cannot rule on ownership of customary land,⁵⁸ it can intervene in leases. In the case of *Solomon v Turquoise*,⁵⁹ the Minister approved a lease, which was then registered, knowing there was a dispute affecting the land. The court, in a decision which was upheld on appeal,⁶⁰ set aside the registered lease on the grounds that the leaseholder was not yet in possession. The Supreme Court held that the possibility of retrospective cancellation of registration, provided in the legislation, is deliberate and has been included in order "to accommodate Vanuatu's circumstances."⁶¹ In particular, if there is a title dispute going through the Customary Lands Tribunal system then:

if rectification is not ordered and the custom ownership of (the claimant) is later upheld [...] he will have lost for his own lifetime and probably the lifetime of his children, the possession of his traditional land, completely against his wishes. The land may in all likelihood have already been subdivided and homes or other buildings constructed and occupied. That would be a very unfortunate result.⁶²

Consequently, where the Minister makes a 'mistake' as to his or her power to grant a lease – for example, by ignoring the views of custom owners, accepting a bribe, taking into account matters which should not be taken into account, or ignoring those matters which should be taken into account – indefeasibility of title is at risk provided a causal connection can be made between the Minister's 'mistake' and the registration.

Therefore, while purchasers may believe they have indefeasibility of title, in fact in Vanuatu it is possible to cancel registration of a lease if either the leaseholder is not in actual or constructive possession – which requires more than a mere right to come into possession

⁵⁶ For arguments against the assumption that encouraging privatisation of land in the interests of development must be a good thing, see J Fingleton et al, 'Privatising Land in the Pacific – A Defence of Customary Tenures', Australia Institute, Discussion Paper No 80, June 2005.

⁵⁷ For example, the crop lien is found in Fiji as a form of security for small loans to farmers, while cooperative agricultural or tourism building on shared use rights might be one way of encouraging diversification and development.

⁵⁸ *Malas v David* [2008] VUSC 56.

⁵⁹ [2008] VUSC 64.

⁶⁰ *Turquoise v Kalsuak* [2008] VUCA 22, where the Court of Appeal observed "it is clear from the Minister's evidence that he would have so proceeded because of his view that it was for the benefit of Vanuatu and the development of tourism to grant a long term lease over the land".

⁶¹ *Solomon v Turquoise* [2008] VUSC 64, [67] (Tuohy J).

⁶² *Ibid*, [72].

which is implied in every lease – or if there is fraud or mistake.⁶³ The date at which possession will be assessed is “the day when the issue of fraud or mistake was first asserted against the registration” – evidence of which will be strengthened by the registration of a caution – “or, if not then, at the latest when proceedings were issued claiming rectification.”⁶⁴ No doubt advocates of development seeking to reconcile customary interests with formal interests would like to see this loophole closed through legislation, rather than allow the courts to interpret the law so as to protect indigenous interests where quite clearly these are being inadequately considered by the Minister.

6 CONCLUSION

While the clock cannot be turned back, it is argued that aid donors should stand back and take a long hard look at what they have achieved to date with their programs. Who has benefitted – apart from the consultants who took the fee, the foreign companies who secured the contract or people within the country in positions of power who received the back-hander? At extreme ends of the spectrum any investment, whether by aid donors or private investors, can only work in one of two situations. The first is to ride ‘rough-shod’ over any obstacles, cultural sensitivities, differences in values or approaches and keep a firm eye on the profit margins. The second is to proceed with caution, thoroughly evaluating the context in which it is proposed to operate, taking time to listen to and negotiate with all those who may be affected – including those whose voices are less strident – and adopting a realistic time-frame, entry and exit strategy weighing in particular the environmental and social impact of any proposal.

The need for this type of consultation is increasingly being recognised by both aid donors and governments. However, the delayed response to the National Land Summit resolutions indicates that even if the process is truly consultative, the dynamics of international policy and economic drivers can lead to outcomes which do not reflect the views or meet the needs of the electorate. Moreover, the greater the involvement of aid-funded personnel rather than the funding of projects managed by local people, the longer projects are likely to take.⁶⁵ Although ‘Making Land Work’ claims that “since 2005 Vanuatu has [...] been developing a substantial land policy reform”,⁶⁶ there is little evidence to support this claim.

Consultation and careful consideration is one thing, inaction is another, and the mechanics of aid funding do little to address the latter. In any case, advocates of development through ‘making land work’ need to be aware of the dichotomies. They cannot preserve and foster the interest of expatriate investors and at the same time ensure that future generations of *ni-Vanuatu* will have land to work, or even live on, unless they

⁶³ *Land Leases Act 1988* (Cap 163) (Vanuatu) s 100(2): “The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

⁶⁴ *Turquoise v Kalsnak* [2008] VUCA 22, [41].

⁶⁵ See, for example, Don Paterson, ‘Has the National Land Summit Been Hijacked?’, *The Independent* (Port Vila), 21 October 2008. See also Helen Hughes et al, ‘Aid Has Failed the Pacific’, Centre for Independent Studies, Issue Analysis No 33, 7 May 2003.

⁶⁶ Above n 3, 1.

are prepared to listen to the users of bridges, not just the engineers. Moreover, if arriving at the right answers takes time, then action is needed to provide a breathing space.

Time is not on Vanuatu's side. Delays in implementing measures to address the 2006 resolutions have meant that the problems recognised then have continued to proliferate.⁶⁷ What is needed are moratoriums on sub-divisions, on the approval of leases by Ministers, on the privatisation of beaches and the operation of new estate agencies. Ironically, the first task of the Council of Ministers following the National Land Summit was to seek aid-funding for measures to address the problems that the government had allowed to happen without any aid funding. The Vanuatu government has a constitutional duty to ensure that any land alienation is in the interests of the country and its people – both present and future. It is questionable whether the current donor programmes are compatible with the observation of this duty.

Indeed, compliance may require the government to take unpopular steps, such as limiting the amount of sand and coral that can be taken from beaches to prevent erosion and support sustainability, thus frustrating development projects; or limiting contractual autonomy, for example by providing a mechanism whereby the provisions of leases of customary land can be challenged or a 'cooling off' period is provided for by law, thus frustrating investors who are seeking a rapid conclusion to leases; or interfering with property rights, for example by making it compulsory that environmental impact assessments are scrutinised by an independent body, so that developments cannot not be constructed cutting corners and endangering people and the environment. These types of measures and others are found elsewhere and are used because they are felt to be in the best interests of the long-term future of the country and its people.⁶⁸ Such measures however, would require an integrity and denial of self-interest in government which is notably lacking in Vanuatu,⁶⁹ and does not seem to be a pre-requisite to aid funding.

However much aid is invested in the country or however many aid funded consultants are brought in, until those who wield power are prepared to address the long-term future of all Vanuatu citizens and to stand firm against the agendas of outside agencies, not only is change unlikely to happen, but more fundamentally the resolutions of the National Land Summit are unlikely to be satisfied. Alarming, a representative of the Lands Secretariat recently indicated that "we are in the process of building an internet site for our overseas clients" and concluded his letter to the editor by noting that "the number of land investments is increasing."⁷⁰ A few weeks later, he stated "the Land Program 2009 [...] will be implement[ed] in September 2009 along with the AusAID Making Land Work

⁶⁷ Local media continue to carry stories of abuses of power in relation to land. See, for example, 'North Efate Lands Sold Without Land Owner's Knowledge', *The Independent* (Port Vila), 21 March 2009; 'Emtem Lagoon Project Legal Says Aku', *Vanuatu Daily Post* (Port Vila), 6 May 2009 (in which it is clear that the wrong Minister approved the development plan).

⁶⁸ For example, in the Channel Islands there are residency restrictions on who can acquire property in the islands, while in parts of Spain there are moratoriums on coastal development or restrictions on the capacity and building style of tourist hotels. Elsewhere, new buildings may have to meet energy efficiency standards or be certified as being environmentally friendly.

⁶⁹ See, for example, 'MP Regenvanu Forced to Apologise Over Email', *Vanuatu Daily Post* (Port Vila), 22 June 2009, in which outrage was expressed by the new Minister of Lands and the Port Vila Mayor regarding suggestions by a prominent Member of Parliament that there was too much corruption in government.

⁷⁰ Ganileo, above n 19.

Program for the Pacific islands countries."⁷¹ Experiments with Vanuatu's land laws may well place the well-being of this Pacific island at risk.

⁷¹ Ganileo, above n 55.

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LAND AS A FUNDAMENTAL RIGHT: A CAUTIONARY TALE

*Sue Farran**

The article discusses the importance of land rights in the South Pacific for securing the enjoyment of other civil, political, economic, and social rights in the Pacific focusing especially on Vanuatu as a paradigm. The infringement of land rights and the abuse of natural resources in the Pacific have a long history and the consequences on human rights on the whole are severe. The article argues that current constitutional provisions do not go far enough to ensure that land rights are protected and consequently to ensure the enjoyment human rights as a whole.

I INTRODUCTION

The purpose of this paper is to highlight the fundamental importance of land rights for securing the enjoyment of a wide range of other civil, political, economic and social rights in the Pacific region. It is argued that current constitutional provisions do not go far enough to ensure that the land rights of indigenous people are protected; that Governments have an obligation to take more effective measures in promoting the sustainable use of land and its related resources; and that external agencies need to reconsider the agendas they are setting for Pacific island countries if they hope to both foster and derive benefits from peace and stability in the region. In particular this paper focusses on land issues in Vanuatu, but much of what is stated applies equally to other Pacific islands which are characterised by rapidly growing populations;¹ limited opportunity for outward

* Senior Lecturer, University of Dundee, Visiting Lecturer University of the South Pacific, and author of *South Pacific Human Rights: Challenges and Changes* (Routledge-Cavendish, London, 2009) (book review of this book in this volume).

¹ Notably in Melanesian countries, especially Solomon Islands and Papua New Guinea but also in countries such as Kiribati, compare Tonga, Niue and Cook Islands where populations are stable or falling.

migration;² unsustainable economic development based on the exploitation of natural resources;³ and the possibility of aggravating land issues where such unsustainable development continues.⁴

II WHY LAND?

Land and natural resources are central to a long history of rights abuse which continues to have consequences in the region and cannot be ignored. In Pacific islands this has included: the deforestation of many islands by sandalwood traders; the taking and redistribution of land seen as lying idle or neglected by colonial Governments;⁵ the use of Pacific islands for weapon testing;⁶ the taking of land for foreign military bases;⁷ and the exploitation of mineral resources by foreign companies at huge environmental cost.⁸ Even today foreign Governments appear to take advantage of the weak bargaining strength of Pacific islands and the geographical remoteness of their islands.⁹

Moreover, land is fundamental to identity, existence and survival in Pacific countries.¹⁰ For Pacific island people, as for many indigenous peoples elsewhere,¹¹ land is more than its physical

2 Countries such as Papua New Guinea, Solomon Islands and Kiribati, compared with, for example, Cook Islands and Niue.

3 For example, hard wood logging in Solomon Islands and Papua New Guinea and fishing in much of the region.

4 For example, mining in Papua New Guinea.

5 For example, in Papua New Guinea, by 1906 the Crown held around 1,000,000 acres of land either through purchase from customary owners or by being declared waste and vacant (R Crocombe and R Hide "New Guinea" in Crocombe (ed) *Land Tenure in the Pacific* (University of the South Pacific, Suva, 1987) 342. Similar policies were adopted in Solomon Islands (H Scheffler and P Larmour "Solomon Islands: Evolving a new custom" in Crocombe (ed) 303, 312) although it was later found that about 40,000 acres of land declared waste and vacant were found to be occupied under native custom and returned to the customary owners (F Kabui "Crown ownership of foreshores and seabed in Solomon Islands" (1997) *J Pac S* 123, 124). In Marshall Islands although the German administration did not pursue this policy, the Japanese did (W McGrath and W Scott Wilson "The Marshall, Caroline and Mariana Islands: Too many foreign precedents" in Crocombe (ed) 325-345.

6 Notably Bikini Atoll in Marshall Islands on 1 March 1954. The repercussions of this are still being adversely experienced by Marshallese as noted by leaders at the Pacific Forum at their 2006 meeting <http://www.forumsec.org/pages.cfm/press-statments-2006/thirty-sventh-pacific-islands-forum.html> (accessed 20 March 2007).

7 In Marshall Islands and Palau.

8 As in the case of phosphate in Nauru.

9 For example the setting up of Australian refugee asylum camps on Nauru and the trans-shipment of dangerous waste through Pacific islands' waters.

10 H Van Trease *The Politics of Land in Vanuatu* (Institute of Pacific Studies, University of the South Pacific, Suva, 1987) 3.

11 For example, aboriginal people in Australia and Māori in New Zealand.

substance or exploitable potential. People and land are linked physically and spiritually. Where a person is from may be far more important than where they live; where they are buried may be far more significant than where they are born; where they are brought up may be far more significant than ties of affection.

Land issues illustrate the challenges which confront plural legal systems, such as those found in the Pacific region, where customary forms of land tenure remain central to the governance and use of land in many countries, especially those of Melanesia. It is not, however, customary land law that regulates contemporary development but rather introduced laws, which facilitate leases, mortgages, registered land dealings, strata-titles and time-shares. This raft of legislation can be used to develop land for social and economic purposes, for example, by enabling Governments to acquire land for public utilities, to provide greater security of tenure to those who are squatting on undeveloped urban land sites, or by enabling customary owners to raise mortgage finance for commercial enterprises or to improve the land which they retain, for example by providing better housing for their families. It can also be used in ways which confer little or no benefit on customary land owners or the public at large, for example by rendering large tracts of land inaccessible to indigenous people, by encouraging rapid and largely unregulated building construction, and by providing developers with opportunities to capitalise on the complexity of the legal framework and the ignorance of customary land owners. In other words, plural legal systems can operate in such a way so as to defeat or frustrate fundamental rights.¹²

Rights to land also provide examples of the dilemmas of group rights versus individual rights and the issue of rights versus duties. The fundamental right to property enshrined in the written constitutions of the region is framed as an individual right; although no individual right can be exercised or enjoyed without taking into account the corresponding rights of other individuals. Land held under various forms of customary land tenure is generally vested in more than one individual – the family, lineage or clan. Although individuals may emerge as the prime decisions makers or managers of the land they are essentially present custodians for future generations. Often membership of different groups is fluid. For example, land may be exchanged as compensation or bride-price, or it may be forfeited or taken by force. One form of customary land tenure may be replaced by another in times of crisis, under the influence of missionary contact, or through inter-marriage with groups practicing different customs, and then revert, perhaps several generations later, to a different previous form. Claims to titles which confer rights to land may be disputed, as may genealogies, which in turn may be complicated by various forms of adoption of children and adults. This fluidity sits uneasily with the notion of individual title to land, especially if that title

¹² See generally Sue Farran "Is Legal Pluralism an obstacle to human rights? Considerations from the South Pacific" (2006) 52 JLP 77.

becomes unchallengeable by means of registration, and if the title holder is then able to freely deal with the land as he (rarely she) wishes.¹³

At the same time, however, if the constitution confers an individual right to protection of property, why should an individual who has expended labour on property not be able to derive the benefit of this? If the only way to raise finance against the security of property is to create a lease over it then should the senior or more powerful members of a family be prevented from doing so, even if the money raised is squandered or the property seized by the lender in the case of mortgage default? In some systems individuals may be prevented from managing their own land, for example in Fiji the management of native land is the preserve of the Native Lands Trust Board. However, this does not prevent Fijian landowners entering into agreements which by-pass the Board,¹⁴ or from complaints being raised from time to time about the percentage of revenues to which Fijians, especially those who are commoners, are entitled.¹⁵

In rapidly changing economies individuals may be able to do things with land which communities or groups cannot, or they may wish to derive greater benefit from their land than they are entitled to under present arrangements. The Western neo-liberalism which informed the framing of bills of rights, also informed ideas and laws relating to property which were brought into the region and which continue to be the referral point for many land reformers and for individuals or groups seeking to exercise greater autonomy over their land. This can create tension between those who feel that the land should be managed for the benefit of the collective, with perhaps a corresponding limited involvement of those who are beneficially entitled to the land in custom from having a voice, and those who want to claim the full rights of owners.

This tension has arisen from time to time in Vanuatu. For example, in the case of *Noel v Toto*¹⁶, land held under customary land tenure was producing income in the form of fees collected from tourists visiting a beach on the land. Following family disputes as to who was entitled to benefit from this money the Supreme Court ruled that any income should be divided equally among the family members regardless of sex. Despite this ruling there continued to be intra-family tension, culminating in a further case in 2006.¹⁷ At the heart of the dispute was the conflict between the

13 This was a concern being expressed in Samoa at the time of the 2008 Symposium due to proposals – which have been mooted for some years – to reform the system of land registration which applies to alienated land.

14 These are known as "vakavanua arrangements."

15 See S Sharma "The control and protection of native lands in Fiji" Working paper No 6 (1999) 3 JSPL http://www.vanuatu.usp.ac.fj/journal_splaw/Working_Papers/Sharma1.html (accessed 21 May 2009) and J Overton "Land Tenure and Cash Cropping in Fiji" in R Crocombe and M Meleisea (eds) *Land Issues in the Pacific* (University of South Pacific, Christchurch, 1994) 117, 119 and 121.

16 *Noel v Toto* [1995] VUSC 3 (SC).

17 *Noel v Champagne Beach Working Committee* [2006] VUCA 18.

claims of the eldest son to the right of sole ownership and control of the beach and his duty as the representative of the custom owners, including all male and female descendants of the original claimants. On the one hand the family members owed a duty of respect to the head of the family, but on the other failure to co-operate in the management of the land could result in tourists going elsewhere, so he too needed to make decisions which were in the interests of everyone.

Fundamental rights to land also represent a clear example of the relevance of third generation rights in the region. This category of rights has emerged in recent years as a result of the broadening membership of the United Nations and the growing articulation of the concerns of less developed nations. Among these concerns has been the gradual acknowledgment that the influence of economic inequalities in a world which advocates economic rights could itself lead to human rights violations. If there is to be equality of social and economic rights then underlying rights have to be recognised. These include rights to development, peace, a healthy environment and self-determination. They may also include the right to humanitarian aid in times of crisis and to benefit from global efforts on the environment.

Although the concept of "third generation rights" is not without its critics,¹⁸ and the categorisation of rights in this way may be artificial because of the overlap of many rights, it appears that this category of rights envisages not only a domestic rights framework but one that operates in the inter-state sphere, giving effect to the "fraternity" of people and nations.¹⁹ The rights that might be included under the category of third generation rights are: the right to political, economic and cultural self-determination; the right to economic and social development; the right to participate in and benefit from the common heritage of mankind; the right to peace; the right to a healthy and balanced environment; and the right to humanitarian disaster relief.²⁰ Internationally the right to development has been recognised by the General Assembly of the United Nations.²¹ In the

18 For example, J Donnelly "Third Generation Rights" in C Brölmann, R Lefebvre and M Zieck (eds) *Peoples and Minorities in International Law* (Martinus Nijhoff, Dordrecht, 1993) 119; M Freeman "Fifty years of Development of the Concept and Contents of Human Rights" in P Baehr, C Flinterman and M Senders (eds) *Innovation and Inspirations: Fifty Years of the Universal Declaration of Human Rights* (Royal Netherlands Academy of Arts and Sciences, Amsterdam, 1999) 27.

19 K Vasek cited by Donnelly, above n 16, 122. Vasek's concept of "fraternity" drawn from the three principles of the Declaration of the Rights of Man, envisaged these rights as collective and realisable only by the combined efforts of people, states, public and private associations, and the international community.

20 B Weston "Human Rights" (1984) 6 HRQ 257, 266.

21 Declaration on the Right to Development Adopted by General Assembly Resolution 41/128 of 4 December 1986. Article 1 states: "1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. 2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources. "

context of the Pacific it can be argued that if under-developed nations have a right to development, then other members of the international community have a duty to respect this bearing in mind especially the sovereign rights of these nations which entitle them to: first, determine the pace and form of their own development; second, to do so in a way which is conducive to a healthy environment; and third, in a way which is conducive to peace.²² It follows therefore that not only do national Governments have an obligation to their citizens not to pursue policies or endorse, either expressly or implicitly – usually by non-action – legal frameworks which put third generation rights at risk, but also that other non-national agencies, such as the World Trade Organisation, the World Bank, aid donors and international forums have an obligation to offer humanitarian assistance in times of crisis. It may also be argued that these non-state agencies have an obligation to ensure that their role in fostering development does not transgress or jeopardise human rights, including third generation rights.²³

III VANUATU

In Vanuatu as in other Pacific island countries land is everything. "It is a place where ni-Vanuatu can find food and his other basic needs. Land is linked with culture and family relationships. Many people talk about land as "our mother."²⁴

Bonnemaison writing in 1984 stated:²⁵

In Vanuatu custom land is not only the site of production but it is the mainstay of a vision of the world. It represents life, materially and spiritually. A man is tied to his territory by affinity and consanguinity. The clan is its land, just as the clan is its ancestors. The clan's land, its ancestors and its men are a single indissoluble reality – a fact which must be borne in mind when it is said that Melanesian land is not alienable.

Reclaiming the land was one of the cornerstones of the movement towards independence and a key to national identity. It has in recent years also been the cause of political and racial instability, notably in Fiji and Solomon Islands. At the same time land and its resources are seen as being

22 A Kiss and D Shelton *International Environmental Law* (Transnational Publishers, New York, 2004) 12, include the right to intergenerational equity, which is a matter of considerable importance in respect of land and natural resources.

23 Although outside the ambit of this paper this has been a matter of concern with oil conglomerates operating in Africa – see for example, C Nwobike "The African Commission on Human and Peoples Rights and the Demystification of Second and Third Generation Rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*" (2005) 1(2) AJLS 129.

24 R Nari, Director-General of the Ministry of Lands, address to the National Land Summit (25-29 September 2006).

25 J Bonnemaison "Social and Cultural Aspects of Land Tenure" in P Larmour (ed) *Land Tenure in Vanuatu* (Institute of Pacific Studies of the University of the South Pacific, Suva, 1984) 1.

commodities which Pacific islands can, and should, exploit in order to earn hard cash. This is evident in an Australian report entitled "Pacific 2020: Challenges and Opportunities for Growth", published in May 2006. This opens by stating:²⁶

The overall performance of the Pacific island countries in the course of the past two decades has been poor. The region suffers from high unemployment and joblessness, and governments are failing to meet the expectations of their citizens. Several countries suffer from social or political instability, or serious crime. Some face daunting health or environmental challenges. Without an upturn in economic growth, the future for these countries is at best uncertain and at worst bleak.

It goes on to indicate that four out of five Micronesian countries had negative economic growth and that in Melanesia only Fiji managed an economic growth rate over one per cent in the period 1990-2004 – although since 2006 Fiji's economy has declined while that of Solomon Islands has improved. Throughout the region economic growth was lower than comparable developing countries. The report suggests that there are three economic possibilities facing the region: failure to achieve economic growth; maintenance of the *status quo* buoyed up by aid packages and outward migration; and rapid economic growth facilitated by major reforms. The report advocates the latter. It identifies as the major obstacles to positive economic growth: weak governance and poor functioning of Government institutions; poor and insufficient infrastructure; insufficiently developed regional co-operation and economic integration and lack of commitment to implement reforms. The report focuses on five areas of productivity which it sees as needing development if economic growth is to be achieved. These are: agriculture, fisheries, forestry, mining and petroleum, and tourism.

These are areas of activity already being exploited and developed in the region often with little thought being given to sustainability, the social and environmental impact on indigenous people, or the long-term impact on the survival of Pacific islands subject to such exploitation. The exploitation of what are primarily natural resources, while it might be good for the economy – at least in the short term, can pose considerable difficulties and challenges for a range of fundamental rights. At the same time it is clear that near neighbours are encouraging Pacific islands towards more rapid development and greater exploitation of resources.

In 2008 AusAID published a document entitled "Making Land Work" as part of its "Pacific land programme".²⁷ While not seeking to be prescriptive in its advice, the document suggests that reform to land tenure can both deliver security to custom land owners and to investors. At the same time, however, it suggests *inter alia* that land policies must reflect local needs and circumstances, that long timeframes must be accepted, that stakeholders must be actively involved and that vulnerable groups must be safeguarded. The Vanuatu example suggests that these various principles may be

26 <http://www.aisaid.gov.au/publications/pdf/pacific2020.pdf> (accessed February 2008).

27 AusAID "Making Land Work" www.aisaid.gov.au/publications (accessed 21 May 2009).

incompatible. Development is rapid. Lack of centralised land policy, planning, zoning and use control mean that development is uneven, resulting in the displacement of some groups of customary land users while excluding others from any benefits of development. Stakeholders are not always involved in decisions, especially women, and where land is managed by trust boards, agents or even government ministers, the views of stakeholders may be irrelevant. The language of land law, especially relating to leases, continues to be an obstacle to understanding what rights and interests are at stake, and any land policy reform that is put in place may be too little too late.

A further problem, however, is that invariably land reform is framed in Western concepts such as registration of title and indefeasibility of that title; cadastral survey; and the determination of disputes by forums which may not consider fundamental rights, which may not be truly representative – especially as both formal and customary forums tend to be dominated by men, or which may be unconcerned with providing safeguards for vulnerable groups. In particular one aspect which is not sufficiently addressed by "economic advisers" or "development consultants" is the basic difference in perceptions of land. For non-Pacific islanders from developed countries, land is a commodity, which can be traded like any other. For Pacific islanders, however, land is the indigenous heritage of people.

Neither of the Australian reports pause to consider whether brakes should be placed on land development or restrictions imposed either to prevent further foreign investment in land,²⁸ or to regulate the forms of investment which are most desirable – for example sustainable logging of renewable resources or diversity of agricultural productivity in partnership with customary land holding groups.

While the 2008 document suggests that the way ahead is to reconcile customary land tenure and development by "linking customary land into formal economic and legal systems, broad community consensus, extensive technical and managerial skills and long timeframes and adequate funding",²⁹ it perhaps underestimates conceptual, institutional and practical difficulties.³⁰

The exploitation of land and natural resources in the region raises questions about: the right to development and the right to a sustainable environment – and whether these two are compatible; the internal and external forces that determine the pace of change and the issue of self-determination in

28 For example, the purchase of land for residential development by non-citizens could be prohibited – as in some of the Channel Islands.

29 "Making Land Work", above n 26, 133.

30 See for example K Brown "The Language of Land: Look before you Leap" (2000) 4 JSPL <http://www.pacii.org/journals/fjspl/vol04/> (accessed 1 June 2008); S Farran "South Pacific Land Law: Some Regional Challenges, Cases and Developments" (2001) 32 VUWLR 953; J Mugambwe "Judicial Assault on the Citadel of Indefeasibility of Title under the Papua New Guinean Torrens System of Conveyance" (2001) 5 JSPL <http://www.pacii.org/journals/fjspl/vol05/> (accessed 1 June 2008).

deciding priorities and policies; the duty owed by the national government to its citizens; and the obligations of the international community towards Pacific Island countries.

IV CONSTITUTIONAL PROTECTIONS

The protection of property rights is recognised as a fundamental right.³¹ Indeed this is acknowledged in most of the regional constitutions as a right separate from the right to privacy or security from unwarranted search and seizure. What is meant or understood by "property" in this context may include rights to land and other property or this may be unspecified. For example, in Tonga there is no separate right to property but under section 1, Part 1 of the "Declaration of Rights" it is stated under the "Declaration of Freedom" "all men may use their lives and persons and time to acquire and possess property and to dispose of their labour and the fruit of their hands and to use their own property as they will." In some cases this right to property is included among those with respect to which discrimination is prohibited,³² although in fact discrimination in respect of certain property rights, especially land, is a feature of the region.³³ Elsewhere the right is stated to be a right not to be deprived of property, or a right to due process, or a right to compensation.³⁴ These rights are closely interrelated.

A person may lawfully be deprived of their property in certain circumstances which can be broadly divided into two categories: first where loss or confiscation of property is a consequence of personal circumstance and occurrences such as bankruptcy, mortgage default, criminal activity, tax liability or an order of court,³⁵ and second where the Government appropriates such property for purposes beneficial to the public.³⁶ In this latter case there are a number of elements to be satisfied if the deprivation is to be lawful. These include deprivation in accordance with the law; for a public

31 See, for example, ss 8 and 9 Kiribati; Article IV ss 3 and 5 Federated States of Micronesia, ss 40(1) and 64 (1)(c) Cook Islands; sections 8 and 9 Nauru; section 14 Samoa and Art 5(1)(j) Vanuatu. In Tonga property may only be taken in time of war, or to make Government roads or for other works beneficial to the Government (s 18). Note that in the Fiji Bill of Rights there is no express right to protection of property which, given the ethnic discrimination in land rights in Fiji is perhaps not surprising.

32 See, for example, Kiribati, Nauru and Solomon Islands, Tuvalu, and Vanuatu.

33 For example, foreigners may not own customary land in any country of the region. In some countries non-customary land may be owned by foreigners, for example, Cook Islands, Fiji and Samoa – although in Samoa the Head of State must approve this – Alienation of Freehold Land Act 1972, s 6, but in others this is also prohibited. Discrimination on the grounds of gender also occurs; see S Farran, "Land rights and gender equality in the Pacific region" (2005) 11 APLJ 131.

34 See, for example, Marshall Islands Constitution, s 5.

35 For example in the case of insanity, divorce, acquisition by prescription or to effect a trust of property by vesting title in the trustees.

36 Sometimes these may overlap, for example, where a person is deprived of their property because it is dangerous.

purpose;³⁷ and in return for the timely payment of an agreed or just compensation determined by taking into account the criteria specified either in the Constitution or in supplementary legislation. Such compensation may include relocation or the provision of alternative land/housing as well as financial or other non-financial compensation.³⁸ Those deprived of their property should also have the right to due process and access to the courts to challenge any such deprivation. These types of provisions are very much modelled on Western-liberal conceptions of private property.

However, if Governments have a duty not only to observe the letter of the Constitution but also its spirit then it is suggested that the right to property goes further than questions of due process and just compensation in the context of state acquisition. The protection of property rights should be seen as imposing a positive obligation on states and the wider community to adopt policies and take measures which safeguard the property of Pacific island people, including – but not solely – land.

V THE VANUATU EXPERIENCE

The population of Vanuatu is not huge by international standards. In 2007 it was estimated to be around 212,000, with an estimated annual growth rate of 1.46%. Thirty-two per cent of the population is under the age of 14.³⁹ Employment opportunities are limited and outward migration almost zero. There is increasing urban drift. Many young people are now second or third generation dwellers. They have no inclination to return to the original island homes of their parents and may have no claim to land in the islands, especially if their parents are unmarried or have been married but are now separated. Urban poverty and urban crime is on the increase, including property crime. It has been suggested that the urban population will double in size in the next twenty years.⁴⁰

The country's economy is based primarily on small-scale agriculture, which provides a living for 65 per cent of the population,⁴¹ fishing, financial services (offshore) and tourism.⁴² Unlike its near neighbour Solomon Islands, Vanuatu has virtually no timber worth felling as its sandalwood forests were cut down by traders long before independence, nor does it have large mineral deposits as is the

37 For example, public defence, safety, order, morality, health or planning and development.

38 See, for example, Constitution of the Republic of Palau Art IV, s 6; Constitution of the Marshall Islands, s 5(6); the Constitution of Solomon Islands 1978, s 8(1)(c)(i)

39 CIA World Factbook: Vanuatu <https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html#People> (accessed 10 March 2008).

40 M Henare "Putting People First" (European Society of Oceanists Conference, Verona, 10 July 2008).

41 Some sources claim this percentage to be as high as 80. See opening speech at the National Land Summit by the Minister of Lands in Government of Vanuatu "National Land Summit Final Report" (2007).

42 For an overview see <https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html#Econ> (accessed 1 June 2008).

case in New Caledonia, Papua New Guinea or even Solomon Islands.⁴³ Compared to Fiji Islands it has limited manufacturing or retail activity and its off-shore financial services and status as a tax-haven are constantly under scrutiny. The challenges for Vanuatu are how to balance opportunities for development with the needs of a rapidly growing population for whom there are limited employment opportunities, a limited land mass - most of which is vested in customary owners, and limited alternative resources. As elsewhere in the region there is pressure, both internally and externally, for Vanuatu to attract inward foreign investment. One of its main means of doing this is to exploit the land, either by way of tourism development, or by accommodating individuals seeking second or holiday homes.

The consequence of this has been rapid land alienation in the last ten years, especially on the capital's island of Efate, coastal land and small outer islands. Indeed it would appear from survey maps accessed in 2007 that almost all the peripheral land of Efate has now come under leasehold and other islands are also becoming the target of property developers. Not only does this mean that all the coastal land is being potentially taken out of use for customary owners and the general public – for leisure purposes for example, but these coastal leases tend to run inland over potential agricultural land,⁴⁴ and also into areas of natural bush designated suitable for a national park in the north-west of Efate.

The situation in Vanuatu is due to a number of factors. First, because so much land had been alienated to foreigners in the century before independence when the 1980 Constitution returned land to customary ownership, it was necessary to put various transitional provisions in place. Among these was a power reserved to the appropriate Minister to manage land where the identity of custom owners could not be established or where there was a dispute as to who the rightful owners were.⁴⁵ This power continues so that even today the Minister of Lands yields considerable and often unaccountable power over land which is not public or state land. In particular he has the power to grant leases over land. The fact that the Minister can give good title to a lease means that anyone seeking to lease land – especially an increasing number of land-developers or estate agents, who are invariably ex-patriates, far prefer to acquire land held under the Minister's powers than to go to the trouble of dealing with custom owners, who may be difficult to ascertain, undecided and lacking unanimity. Ministers of Lands have therefore been key players in granting a high percentage of the many leases which currently exist.⁴⁶

43 Although there have been proposals to re-open the iron ore workings at Forrari on the north-east coast of Efate.

44 A number of former cattle ranches have already succumbed to sub-division. As organic beef is one of the important agricultural exports of the country this may be under threat if this type of land use continues.

45 Constitution of the Republic of Vanuatu, Art 78(1).

46 S Farran "Ministerial leases in Vanuatu" Working Paper (2003) 9 JSPL available online <http://www.vanuatu.usp.ac.fj/> (accessed 1 June 2008).

Second, while foreigners who had acquired freehold titles prior to independence could no longer hold such titles to land – as freehold was abolished entirely, they could enter into leases of land. Thus leases became an integral part of the Vanuatu legal landscape. Initially these were primarily agricultural leases of thirty or forty years' duration. Under the Land Leases Act (Cap 163) however there is scope for leases to be of seventy-five years duration, and as the shift has been away from agricultural leases to residential leases, this period has become common, as has the use of sub-division of larger plots – many of which were formerly agricultural holdings, usually by developers.

Third, the introduction of the foreign concept of "strata titles", has facilitated the process of sub-division further. Although the purported aim of the Strata Titles Act 2000 was to provide for the sub-division of buildings into separate lots by registering a strata title plan and thereby afford security to small businesses in shared urban buildings, it is evident that the Act has been used for the sub-division of undeveloped land outside the urban areas and that this is in fact facilitated by amendments made to the original Act in 2003. As the Land Leases Act already provides for sub-division it is suspected that the Strata Title Act has been used because it lacks the safeguards for lessors – the custom owners – found in the Land Leases Act.

Fourth, and perhaps ironically, political instability elsewhere in the region especially in Fiji Islands and Solomon Islands has seen an upswing in tourism to Vanuatu. Visitors are bombarded with the advertisements of property developers who are keen to sell them land, which can be found in the in-flight magazine of the national airline, on the internet and in the shop-front windows of high street estate agents in the capital Port Vila.

This surge in land alienation, whether by the Minister, by developers or representatives of custom owners has led to much of Efate and a number of the off-shore islands coming under leasehold. In 2002 it was estimated that a quarter of the entire island of Efate was under leasehold, with the majority of leases being on prime coastal land.⁴⁷ In 2008 it was estimated that as much as fifty percent of Efate was under lease.⁴⁸ Significantly, the majority of these prime site leases are not held by indigenous people but by foreigners. In the peri-urban area of Port Vila customary land owners are finding themselves squeezed out and the general public is being denied access to beaches, the reef and former gardening land. Escalating urban migration has led to a number of squatter settlements within and on the outskirts of Port Vila – most of which are not seen by tourists, increased inland bush clearing for food cultivation, increased theft from gardens and problems of law and order. This in turn has led to suggestions by some traditional leaders that freedom of movement should be restricted so that islanders who do not have customary land on Efate are prevented from settling on the land of others, and that young persons who cause trouble should be

47 Ibid. This was a statistical calculation based on close scrutiny of all registered leases outside the Port Vila municipal boundary.

48 J Fingleton, A Naupa and C Ballard "Village land trusts in Vanuatu: 'one common basket' in "Making Land Work" above n 26, Vol 2, 21, 24.

"sent back to the islands". Research undertaken in 2007 indicated that where properties had been acquired and developed by non-ni-Vanuatu, self-help security measures were increasingly evident, including the use of guard dogs, private security patrols, barriers across roads, electric gates and razor wire above walls and fences.⁴⁹

Vanuatu is not oblivious to the problems of rapid land alienation and the threat to the property interests of indigenous people. During the course of 2006 a number of provincial meetings and consultations took place to consider land issues.⁵⁰ These culminated in a National Land Summit in September 2006. The aim was to review issues of land management and development. In particular a need to address issues of land ownership, fair dealing, and the role of Government in the management and development of land were identified as key issues. What was interesting about the Summit was not only that it generated considerable public debate and participation, but also that although it was facilitated by donor funding, the outcomes at first instance were those of the indigenous people.

These were articulated in a list of twenty resolutions many of which sought to strengthen customary property rights. In summary these were: the law should recognise and give effect to communal ownership of land; the central and provincial governments and the National Council of Chiefs should work together to document the custom (*kastom*) that determine ownership, land policies, boundaries and land dealings; greater awareness of the existing (plural) legal and economic framework should be undertaken; the current law of leases should be reviewed; lease agreements should be made comprehensible and inclusive in their negotiation and agreement; certificates of negotiation should be subject to increased scrutiny and publicity, especially at the local level; the Minister should cease to have the power to approve leases over disputed land; abuses of the use of strata title should cease and land owners be involved in their approval; real estate agents should be regulated; lease rental and premium rating should be reviewed and reformed; pre-approval conditions directed at ensuring sustainable development should be put in place and effectively enforced; physical planning and zoning laws should be strengthened and a sub-divisions policy put in place at national and provincial level, and efforts should be made at all levels and to all sectors of the community to raise awareness of sustainability issues.

Following the Summit a local Steering Committee was formed to take matters forward. 2008 was envisaged by the Lands Steering Committee as the year in which there would be increasing public awareness of the land issues highlighted at the 2006 summit, leading to a new Land Law Act in 2009. Whether this latter target will be met remains to be seen. However, some steps have been taken. For example, immediately following the Summit a moratorium was imposed on the granting

49 S Farran "Selling the Land: Should it Stop?" (Society of Legal Scholars Conference, Cambridge, April 2008).

50 *National Land Summit, Final Report*, above n 40, 15.

of new sub-divisions and the surrendering of agricultural leases;⁵¹ detailed draft laws have been formulated to govern land use; guidelines for land sub-division have been drafted; fieldwork has been started to establish customary boundaries and case-studies have been undertaken to establish a factual understanding of customary tenure at ground level. Proposals that the power of the Minister of Lands be curtailed have not been successful, probably because this would have entailed the Minister himself introducing the motion. It might also be noted that many of those who are in power have vested interests in land development, for example because they come from those areas benefiting most from this, especially Ifira,⁵² and may be politically reluctant to "kill the goose that lays the golden eggs".

A second consequence of the Summit was that aid funding was found to support a consultancy "review" team to come up with proposals. In 2007 the Review team produced a report which suggests that key issues which needed to be addressed were: lack of a national land policy,⁵³ weaknesses in land administration and a need to reform the law. It has proposed aid-funded programmes to build capacity and good governance in the public sector and to strengthen the various institutions which facilitate land transactions. While these proposals may improve the administration of land dealings it is questionable whether they will address a more fundamental question which is whether the continued alienation of land to predominantly foreigners, is compatible not only with the sustainable development, peace and security of the people of Vanuatu but with the fundamental right to live on their own land. These measures will also not address the question, left unanswered by the provision in the Constitution that all matters pertaining to land should be determined by reference to custom, namely what is that custom and is it compatible with human rights?

At the time of writing an interim coalition Government is in power pending national elections, for which a large number of candidates are putting themselves forward, many as independents. Government changes may mean that some of the impetus of the National Land summit and its resolution will be lost.⁵⁴ In the meantime there is real concern among local people, especially those who are not benefiting from the economic profits of land alienation, or who have made short-term gains but see longer-term misery ahead.

51 It now appears that the moratorium was never implemented (April 2009).

52 See Fingleton, Naupa and Ballard, above n 47, 24.

53 Guidelines for which were subsequently published in the 2008 "Making Land Work" Report by AusAID referred to above n 26.

54 At the time of going to press the elections have been held. A new Government is in place, but not one of the land resolutions have been given effect although the Vanuatu Government has produced a draft "Land Sector Framework" 2009-2018" document – with the help of AusAID.

As with so many areas of development there is a tension. Although a number of the resolutions of the land summit indicate that the appropriate response lies in improved central administration, in many ways this is at odds with resolutions advocating more involvement by customary land owning groups, a greater role for chiefs, and non-governmental agencies, such as the Vanuatu Cultural Centre. Enhancing the role of customary custodians of land could be a double sided sword. A recent example emerges regarding claims for compensation in respect of damage to property caused by the construction of a round-island road under a Millennium Development project funded by the United States of America. The executive of Efate island council of chiefs, the Vaturisu, decided on 22 July 2008, that any claim was to be directed to a nominated spokesperson on the council.⁵⁵ Should there be any disputes then these were first to be referred to the village level and as a final resort to the Vaturisu. While this will leave the construction company free to get on with its work and the project managers need not concern themselves with issues of compensation, it does mean that individuals who have a constitutional right to the protection of property and against unjust deprivation of it,⁵⁶ are effectively being denied access to the Supreme Court, which is the court of jurisdiction for alleged breaches of fundamental rights.⁵⁷

There is also a fundamental dilemma between the rights of individuals to manage and, if they so want lease their land, for seventy-five years and use the money as they wish – exercising their social and economic rights, and the need to preserve land for future generations. Money realised by the premium and rents attaching to a lease are not the sole beneficial property of the present customary owners – as illustrated by the case of *Noel v Toto* mentioned above. Therefore any monies should be placed in trusts and managed accordingly. Frequently this does not happen. Where it does, the management of funds may lack transparency, beneficial distribution may be inequitable and sound financial management may be questionable. This is not solely attributable to lack of probity – although that too may be a problem, but to lack of understanding regarding the institution of the trust – which is after all an introduced concept, and lack of appreciation of the duties and obligations of the trustee role. As a consequence, it can happen that funds realised by the granting of leases are rapidly consumed or dissipated.

In countries such as Vanuatu, with restricted usable land because of the steep volcanic interiors of islands and poor access, land is not limitless. As elsewhere in the Pacific region many of the population remain dependent on the land for subsistence, and may have nowhere else to go. The challenge is therefore how to ensure "that traditional land tenure systems remain viable and relevant in a global economic system propelled by market forces".⁵⁸ This is a question which should engage

⁵⁵ (24 July 2008) *Vanuatu Daily Post* Port Vila 4.

⁵⁶ Constitution of the Republic of Vanuatu, Art 5(1)(j).

⁵⁷ *Ibid*, Art 6(1).

⁵⁸ H Amankwah "Traditional values and modern challenges in property law" (2007) 11 JSPL <http://www.paclii.org/journals/fJSPL/vol11/No1/> (accessed 1 June 2008).

not just national Pacific Governments but also the international community. It is a matter of fundamental rights. If there is to be development then more effort will have to be made to ensure that it is sustainable, not just for the "get-rich quick" present generation but for future ones. In 2006 the National Land Summit held a National Youth Essay and Poster Competition. A twelve year old prize-winner wrote this:⁵⁹

By the year 2015, people might have sold out most of their lands which is not good. If they continuously sell their lands, where will their fourth or fifth generations live? Maybe they will be sitting along the streets begging for food and without any jobs. So I think that that's not a good stage for people to be at, or else Vanuatu will get worse than other Pacific islands.

VI CONCLUSION

The relationship between economic development and human rights is a difficult one. Internal and external pressure to attract inward investment, improve opportunities for participation in a monetary economy and achieve capital growth may mean that individual needs are sacrificed or shelved to meet national growth plan targets, which in turn are geared to satisfying regional goals or international standards, for example, to enter into an EU-ACP agreement or to comply with WTO membership criteria. Incentives for economic development and participation in its benefits can lead to widespread and sometimes gross inequalities of wealth with the gulf between the rich and poor leading to social unrest and civil disturbance. This may be aggravated along ethnic lines where wealth or resources are perceived as being enjoyed by one particular group at the expense of another. This economic apartheid may be particularly noticeable in countries which are shifting from subsistence agricultural to monetary economies and are experiencing considerable urban migration and where the disparity in disposable wealth between those who can participate in and benefit from a monetary economy and those who cannot, may be especially great.

Of course it may be argued that these negative trade-offs for economic growth are merely temporary and that ultimately equality, freedoms and needs will all be met and that civil and political rights will thrive. The truth is, however, that often economic development is taking place so rapidly that the victims of it are left behind and long-term consequences are conveniently ignored in favour of short-term gain. Moreover inequalities of wealth combined with inequalities of political power can result in a self-perpetuating system of human rights denial, especially where those who most benefit seek to preserve the unequal *status quo*. It is rare therefore to find development matched with an enhancement of civil and political rights as well as economic and social rights.

Unless land issues are addressed and seen as being integral to concerns about human rights, then all other rights may be at risk.

59 L. Laliet "Youth and Land in 2015" in A Naupa Youth and Land in 2015: Selections for Vanuatu's 2006 National Land Summit Youth Essay and Poster Competition (Australian Government/AusAid, Port Vila, 2006).

Publication 5

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CHAPTER 5

Vanuatu – A Tinder-box in the Pacific

Sue Farran

INTRODUCTION

As a coincidence of history, Western notions of property – founded principally on alienability and its underlying assumption of exclusivity – have spread throughout the developed and developing world. In many of the island nations of the Pacific, these Western proprietary notions are at loggerheads with traditional culture and law. Vanuatu is one such nation. Taking Vanuatu as an example, this chapter considers the sometimes competing claims of land as security for customary owners; the security of tenure of non-customary owners who lease the land, who may be indigenous or may be non-indigenous; and the prospects of threats to national peace and security where policy and law appears to favour lessees over customary owners.

Traditional perceptions of property in Vanuatu are different from Western liberal concepts in this field. It has been stated that:

Land is central to the identity, and hence the future, of the ni-Vanuatu. In consequence, any form of estrangement from the land results in a deep sense of loss, particularly where it results from poor decision-making, self-interest or corruption. In the worst cases this would easily lead to conflict.¹

This chapter explores the potential for conflict triggered by land use, management and alienation, focussing on the tension between customary and introduced perceptions of land. It considers to what extent these differences present insoluble dilemmas and, consequently, potential future unrest in a country where today an increasing number of land tenants are not indigenous but foreigners.

BACKGROUND

The archipelago of islands that are today known as the Republic of Vanuatu were first discovered in 1606 by the Portuguese navigator Ferdinand de Queiros leading a Spanish fleet. The next European to circumnavigate Vanuatu was the French explorer Louise-Antoine de Bourganville in 1768. In 1774 the Englishman Captain James Cook put the islands on the map as the New Hebrides. Until the 1820s few Europeans visited the islands, but in the decades between 1840 and 1860 the sandalwood trade brought an increasing number of Europeans to the islands – along with their diseases, which on some islands, such as Erromango, decimated the native population. French and English missionaries started to arrive in the early 1840s, followed by planter settlers from the 1860s onwards.

¹ DE Swete Kelly, D Larden and K Lyons, *Concept Document for Future Australian Assistance in Land Reform in Vanuatu* (AusAID, 2009), 21. Comments in this chapter are accurate as far as can be ascertained as at May 2009.

Competitive land acquisition between rival French and Anglo-Australian companies meant that indigenous people were deprived of considerable areas of land, often for minimal payment and without proper documents of transfer. Although some land was returned to islanders prior to independence, settler incursion into "dark bush", which was not only uncleared land but land imbued with spiritual and mythical significance, provided much of the indigenous impetus for the political movement towards independence, one of whose main demands was the return of land to the people.

The year 1980 saw the success of this movement: the New Hebrides became the Republic of Vanuatu and in its new constitution all land was stated to be vested in the indigenous customary owners. Overnight this effectively removed any ownership rights of non-indigenous land occupiers as well as any rights of indigenous occupiers who were not the customary owners. This had a number of practical consequences. First, after more than one hundred years of land transactions there were inevitably disputes as to who were the original customary owners. Second, provision had to be made for non-customary owners who were in actual occupation of the land. Third, there had to be a mechanism for resolving disputes between occupiers and owners and competing claims of ownership. Finally, there had to be some consideration of how inward investment, as evidenced by the plantations and other settler projects, could be continued and developed.

WHO WERE THE CUSTOMARY OWNERS?

According to indigenous tradition, rights to land in Vanuatu were established by settling on the land and building the first "nasara", or meeting place, there.² Subsequently, title could be established through the physical evidence of graves, boundary markers and the planting of trees, and oral evidence of lineage and ceremonies. In some cases people from one island were allowed to settle on another island, either because of established blood or affinity links, or as licensees fleeing disaster or fighting. These migrants came under the guardianship of the customary landowners. The transfer of land from one generation to the next was in some areas matrilineal, in others patrilineal. Sometimes the method for transferring land would change from one system to the other and back again, or

² See eg *Manassah v Koko* [2005] VUIC 3. It was explained, with reference to land tenure in Malekula, that: "In this region, land is communally owned based on common descent, residence within a nasara and participation in common activities. A tribe or a bloodline is identified with the land through its nasaras. Within an original or big nasara there are small nasaras or *Smol faea* which are associated in some respect with the original nasara and its paramount chief. The same word *smol faea* is interchangeably used for referring to a subordinate or lower chief. The same token is applied with the word *Big faea* meaning higher chief. Individuals within a tribe are closely tied up with his territory by affinity and consanguinity through blood and marriage." See also *Holuon v Edward* [2007] VUIC 4, where it was stated, "generally the island of Paama is predominantly a patrilineal society. Ownership of customary land is communal or collectively owned based on common descent, residence within a nasara and participation in common activities. A tribe or bloodline is identified with the land through the nasaras. Individuals within the clan are closely tied up with their territory by affinity and consanguinity through blood and marriage. A group of persons belong to a family line and a territory is sometimes identified with a totem, such as a plant or an animal."

be ambi-lineal. Tracing genealogies is therefore an important aspect of land claims and can often be contentious. There may also be differences in interpreting the applicable custom.³

Often white settlers coming to the country failed to appreciate these complexities and dealt with whoever presented themselves as representing the customary owners. This gave rise to dispute because the traditional system of ownership is communal: deliberations have to be held and consents obtained. The representative of a group is usually a chief. However, entitlement to claim this status is often challenged, as the title of chief must be achieved and retained, and is not determined solely by birth status.

There were efforts in the years leading to independence to halt the alienation of land to foreigners and to return it instead to indigenous owners. For example, in 1971 Joint Regulations were passed to limited sub-divisions.⁴ From 1906 to 1980, the Joint Court, which was in place under Anglo-French Condominium rule prior to independence, resolved a number of disputes relating to title.⁵ By 1973, hoping to defuse growing tension, the French government had handed back some areas of undeveloped land to indigenous owners, and the British government, working with the Australian government, had agreed to transfer land to a Land Trust Board which, in turn, would restore the land to the customary owners.⁶ By the time of independence about 20 per cent of alienated land had been returned to traditional owners. While the Constitution automatically returned title to land to customary owners, these owners had first to be found. Local Land Committees were established to identify these owners and to resolve competing claims.

It was however inevitable that there would be unclaimed land or land claimed by more than one customary owner or group. Anticipating this, the Constitution provided that where title was in dispute or unclear then the land vested in the appropriate representative of the government, the Minister of Lands, until the dispute was resolved.⁷ Although no doubt intended as an interim provision the vesting power of the Minister has never been removed and continues to be exercisable under the *Land Reform Act*.⁸

3 See generally, J Guiart, "Land Tenure and Hierarchies in Eastern Melanesia" (1996) 19(1) *Pacific Studies* 1; M Rodman, "Breathing Spaces: Customary Land Tenure in Vanuatu" in G Ward and E Kingdon (eds), *Land, Custom and Practice in the South Pacific* (Cambridge University Press, 1995), p 65.

4 *Joint Regulation No 15 1971* (Vanuatu); *Joint Regulation No 16 1971* (Vanuatu).

5 The resolution of land disputes was one of the key features of the 1906 Convention establishing Condominium government of the New Hebrides and the 1914 Protocol. The Joint Court was established under the former but its powers were enlarged under the latter.

6 H Van Trease, *The Politics of Land in Vanuatu: From Colony to Independence* (Institute of Pacific Studies of the University of the South Pacific, 1987), p 217. Neither government could influence private land owners to return their land to custom owners, so the potential for conflict, and the platform of political reform, remained.

7 *Constitution of The Republic of Vanuatu*, art 87(1).

8 *Land Reform Act [Cap 123] 1980* (Vanuatu).

CONTINUING OCCUPATION OF NON-CUSTOMARY OWNERS

While some foreign owners never settled on the land they acquired, or abandoned it at independence,⁹ others settled and cultivated it, with some in occupation for a considerable time. Where such occupation occurred, various post-independence options were available. Settlers could: release the land back to customary owners once they had been paid compensation by them; be granted a lease of the land; or benefit from a combination of these if the customary owners wished to reclaim some but not all of the land.¹⁰ Any customary owner(s) wishing to enter into a lease with a tenant had to be recognised as the appropriate person(s) to negotiate such a lease and the settler/occupier had to demonstrate that the land had been alienated to him or her (or a predecessor in title). Initial provision for this was made in the *Land Reform Regulation*,¹¹ which allowed a person in occupation of land with a freehold or beneficial interest to apply for recognition as an "alienator", provided they had maintained the land in reasonable condition. The Regulation was later replaced by the *Land Reform Act*.¹² Here, alienators were allowed to remain in occupation pending determination of the compensation payable on quitting the land or until a lease was granted by the customary owners. A lease so granted was guaranteed so long as it was registered in the Records Office.

In 1982 the *Alienated Land Act*¹³ provided the framework for facilitating negotiations between settler occupants (alienators) and customary owners. The former had to apply within three months of the Act coming into force to be registered as an alienator.¹⁴ While it was therefore evidentially easier to establish who the potential alienator was, discovering who the customary owners were was not always as easy. As noted earlier, where the customary ownership of occupied land was disputed, or the land was not occupied by an alienator but customary ownership was equally contentious, or the land was unoccupied and inadequately maintained,¹⁵ the Minister's powers under the *Land Reform Act* were exercisable.¹⁶

9 Some voluntarily, but others because they were deported for their political activities.

10 *Land Reform Act [Cap 123] 1980 (Vanuatu)*, s 3. This replaced a Joint Regulation passed before independence. Joint Regulations were laws passed by the Anglo-French Condominium government – usually for indigenous people.

11 *Joint Regulation 31 1980 (Vanuatu)*.

12 For a successful claim, an "alienator" had to establish that they: (a) had freehold or perpetual ownership of land whether alone or jointly with another person or persons; or (b) had a right to a share in land by inheritance through will or operation of law where no formal transfer of that land had taken place; or (c) had a life interest in land; or (d) had a right to land or a share in land at the end of a life interest; or (e) had a beneficial interest in land: *Land Reform Act [Cap 123] 1980 (Vanuatu)*, s 1.

13 *Alienated Land Act [Cap 145] 1980 (Vanuatu)*.

14 *Alienated Land Act [Cap 145] 1980 (Vanuatu)*, s 3.

15 This last point is contentious as, firstly, a number of alienators simply abandoned the land at independence and, secondly, not all custom usage is related to cultivation.

16 *Land Reform Act [Cap 123] 1980 (Vanuatu)*, s 8:

The Minister shall have general management and control over all land –

(a) occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; or
(b) not occupied by an alienator but where ownership is disputed; or

HOW WERE DISPUTES TO BE RESOLVED?

Traditionally, land disputes were resolved in custom and this seems to have survived the Condominium, except where such disputes were between indigenous and non-indigenous parties. At independence, in line with the constitutional provisions giving effect to the application of customary law to land,¹⁷ Island Courts were charged with resolving land disputes with appeals going to the Supreme Court.¹⁸ Any Supreme Court judge hearing an appeal had to appoint two or more assessors, who were knowledgeable in custom, to sit with him or her.

The *Island Courts Act*¹⁹ conferred power on the Chief Justice to establish these Island Courts throughout the country. They were to be supervised by a Chief Magistrate, but it was the President of the Republic “acting in accordance with the advice of the Judicial Service Commission” who was to appoint:

... not less than three justices knowledgeable in custom for each island court at least one of whom shall be a custom chief residing within the territorial jurisdiction of the court.²⁰

The Court was fully constituted when sitting with three justices and a clerk and was to:

... administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order.²¹

The Act gave civil and criminal jurisdiction to the Island Courts but each court had to be established under its own warrant issued by the Chief Justice. The first courts were set up in 1984 and by 1999 there were eight such courts.²² This meant that a number of areas did not have a court to hear disputes relating to customary land. Indeed, it has been suggested that:

(c) not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained.

(2) Where the Minister manages and controls land in accordance with subsection (1) he shall have power to –

(a) consent to a substitution of one alienator for another;

(b) conduct transactions in respect of the land including the granting of leases in the interests of and on behalf of the custom owners;

(c) take all necessary measures to conserve and protect the land on behalf of the custom owners.

17 Constitution of The Republic of Vanuatu, art 78(2).

18 *Island Courts Act* [Cap 167] 1983 (Vanuatu). This Act has been supplemented by the: *Island Courts (Power of Magistrates) Order* 2003 (Vanuatu); *Island Courts (Supervising Magistrates) Rules* 2005 (Vanuatu); *Island Courts (Civil Procedure) Rules* 2005 (Vanuatu); *Island Courts (Criminal Procedure) Rules* 2005 (Vanuatu); *Island Courts (Court Clerks) Rules* 2005 (Vanuatu); *Island Courts (Amendment) Act* No 29 2006 (Vanuatu).

19 *Island Courts Act* [Cap 167] 1983 (Vanuatu).

20 *Island Courts Act* [Cap 167] 1983 (Vanuatu), s 3(1).

21 *Island Courts Act* [Cap 167] 1983 (Vanuatu), s 10. “If a justice or an assessor has any personal interest or bias in any proceedings” they are disqualified from sitting: *Island Courts Act* [Cap 167] 1983 (Vanuatu), s 26.

22 A Jowitt, “Island Courts in Vanuatu” (1999) 3 *Journal of South Pacific Law – Working Papers* 7.

The most obvious problem is the fact that many of these courts exist in name and warrant only. Adequate funding and personnel are lacking, so most island courts are mere fictions. Those that do operate tend to do so sporadically, resulting in large delays for complainants.²³

Although some of these issues have been addressed, it remains the case that there are only eight Island Courts. This means that many islands, even large ones such as Pentecost, are without a court.

Furthermore, the geographical jurisdiction of the courts encompassed not only people from different islands but also those observing different customs. This was hardly surprising as:

Vanuatu is very ethnically diverse, with approximately 108 distinct linguistic and cultural groups ... with such cultural diversity there is no such thing as a single custom law that applies to all of Vanuatu ... [a] person may therefore be judged by justices who operate under customary norms that they are not familiar with.²⁴

In the result, a great number of cases were appealed to the Supreme Court, creating an insurmountable backlog of cases and culminating in a refusal by the Supreme Court to hear any more land appeals. In 2001 the civil jurisdiction of Island Courts to hear customary land disputes was removed.²⁵ This did not however deny an Island Court's jurisdiction to consider cases pending before it, and eight years later Island Courts continue to rule on land cases.

Also in 2001, the *Customary Land Tribunal Act*²⁶ set up a new tier of courts to consider and rule on customary land claims. In order to address some of the jurisdictional issues of Island Courts, these tribunals were established in hierarchical order at local, area and island level. To avoid the problem of appeals to the Supreme Court the new legislation provided no appeal from the decisions of the highest Customary Land Tribunal to the ordinary courts, although the Supreme Court enjoys a supervisory function under s 39.²⁷

As with the Island Courts not all areas have customary tribunals yet and the efficacy of those that do exist is questionable.²⁸ A 2004 review of the Customary Land Tribunal system revealed considerable problems, including that people were unaware of the tribunals or did not understand how they functioned. Despite the recommendations of the drafting committee, there was very limited involvement of women on the various tribunals, which is especially problematic where title is matrilineal. Moreover, the review found that many chiefs saw the new system as undermining customary rules.²⁹ As well, disputes about rightful holders of chiefly title challenged the eligibility of those entitled to sit on the tribunals. There has also been judicial challenge to the competence of the Customary Land

23 See n 22.

24 See n 22.

25 *Island Courts Act* [Cap 167] 1983 (Vanuatu), s 8(2), amended by *Island Courts (Amendment) Act 2001* (Vanuatu).

26 *Customary Land Tribunal Act* [Cap 271] 2001 (Vanuatu).

27 See eg *Umou v Erromango Island Land Tribunal* [2008] VUSC 65.

28 See Republic of Vanuatu and Department of Lands, *Land Tribunal Progressive Report* (2003).

29 R Regenvanu, "Issues with Land Reform in Vanuatu" (2008) 12(1) *Journal of South Pacific Law* 63, 65.

Tribunals to adjudicate customary land claims.³⁰ At the same time, however, the jurisdiction of chiefs acting outside the formal system has also been questioned.³¹

Although the Supreme Court will not hear appeals in the way it used to under the *Island Courts Act*,³² it does exercise a supervisory jurisdiction under s 39 of the *Customary Land Tribunal Act*.³³ The Supreme Court may also make interlocutory orders pending the resolution of land claim conflicts by the appropriate court³⁴ and although it may not decide on ownership, it can rule on related matters such as trespass, nuisance, compensation for illegal logging or non-compliance with statutory formalities.³⁵

HOW WAS LAND DEVELOPMENT TO PROCEED?

The political agenda leading to independence was to return control and benefit of land to Vanuatu's indigenous peoples. Nevertheless it was recognised that Vanuatu's economy would have to develop, in order to meet the needs of the people and also so that Vanuatu could take its place in regional markets. Early post-independence land policy remained focussed on agricultural development, in the hope that joint ventures between customary owners, settlers and investors would be central to future prosperity.

While leases would be the vehicle that facilitated such ventures, it was envisaged that these would be for a relatively short duration, 30 years, and only exceptionally longer, up to a maximum of 75 years (notionally the life of a coconut palm), and would be negotiated by representatives of the customary owners concerned.

Under the Constitution, while customary owners enjoyed freedom to deal with their land, the government retained the responsibility of preventing transactions prejudicial to the interests of either the customary owners, the local community or the national community.³⁶ It was envisaged, therefore, that the government would put in place policies that oversaw transactions relating to land.

The Constitution also envisaged that, after consultation with the national council of chiefs, Parliament would enact a national land law in order implement those articles relating to land – *Constitution of The Republic of Vanuatu* arts 73 – 75.³⁷

30 D Mackenzie, "Case Note: *Valele Family v Touru* [2002] VUCA 3: The Legality of Customary Land Disputes in Vanuatu" (2006) 10(2) *Journal of South Pacific Law* 4.

31 See eg *Valele Family v Touru* [2002] VUCA 3. It was held that even where a group of chiefs was approved by the Minister of Lands, they could not rule on a land dispute as they were not appropriate "customary institutions or procedures" empowered under the *Constitution of The Republic of Vanuatu*, art 78(2).

32 The actual jurisdiction of the Supreme Court in land cases is unclear. See eg *Cevuard v Samsen* [2003] VUCA 10. It was held that "custom ownership of land can only be finally determined by one of the tribunals in whom the relevant jurisdiction is vested by the Constitution, namely an Island Court, or the new Land Tribunal, or on appeal by the Supreme Court".

33 See eg *Umou v Erromango Island Land Tribunal* [2008] VUSC 65.

34 See *Cevuard v Samsen* [2003] VUCA 10; *Livo v Boetara Trust* [2002] VUCA 10.

35 See eg *Warput v Santo Veneers Ltd* [2004] VUCA 18.

36 *Constitution of The Republic of Vanuatu*, art 79.

37 *Constitution of The Republic of Vanuatu*, art 76.

In the interim, various laws were passed: the *Land Leases Act*³⁸ in 1983, which governed transactions between an indigenous citizen and either a non-indigenous citizen or a non-citizen; the *Lands Referee Act*³⁹ in 1983, which provided for a Lands Referee to value land for purposes of compensation;⁴⁰ the *Land Surveyors Act*⁴¹ in 1984; and the *Land Acquisition Act*⁴² in 1992 to govern situations where the government acquired land "in the public interest".

CURRENT LAND ISSUES

Although there have been some national measures put in place to regulate and facilitate land dealings since the early years of independence,⁴³ essentially in the nearly 30 years since 1980 there is still no national land law. The Minister of Lands – or his equivalent – continues to exercise considerable power under the *Land Reform Act* (which replaced the *Land Reform Regulation* of 1980), including power over land that was never actually alienated to non-indigenous owners but over which there is continuing dispute or uncertainty concerning the identity of the true customary owners.

While perpetual title to land can only be held by indigenous citizens,⁴⁴ land held under customary tenure can be leased. As post-independence agricultural leases have come to an end, large tracts of land formerly used for farming have been sub-divided. Most of these leases are for 75 years, even for residential land. Indeed it has been openly stated that:

... by 2005, [the sub-divisional potential of the property] is where its value lay ... there was a real estate boom in Vanuatu in the period, particularly focussing on waterfront properties for subdivision ... the real value of the land was not in the resort ... but in the potential for subdivision.⁴⁵

In some areas customary owners have thereby alienated a considerable area of their land and are left with increasingly small areas for their own use.⁴⁶ In some cases this has necessitated re-settlement, either on the land of other customary owners or through clearing native bush. While the environmental impact of rapid

38 *Land Leases Act* [Cap 163] 1983 (Vanuatu).

39 *Lands Referee Act* [Cap 148] 1982 (Vanuatu).

40 For a long time no referee was in post. This Act has been replaced by the *Valuation of Land Act* [Cap 288] 2003 (Vanuatu) and the *Land Valuers Registration Act* [Cap 289] 2003 (Vanuatu). The latter has not, however, prevented unregistered valuers from operating, see *Cyrel v National Bank of Vanuatu* [2008] VUSC 55.

41 *Land Surveyors Act* [Cap 175] 1985 (Vanuatu).

42 *Land Acquisition Act* [Cap 215] 1992 (Vanuatu).

43 See eg *Physical Planning Act* [Cap 193] 1986 (Vanuatu); *Strata Titles Act* [Cap 266] 2000 (Vanuatu); *Customary Land Tribunal Act* [Cap 271] 2001 (Vanuatu). The *Freehold Titles Act* [Cap 233] 1994 (Vanuatu) was also passed in 1994 but has never been used and, if it was, could be subject to constitutional challenge. An *Urban Lands Act* 1993 (Vanuatu) was passed and then repealed (*Urban Lands (Repeal) Act* 2003 (Vanuatu)), however the repeal has never been made effective.

44 *Constitution of The Republic of Vanuatu*, art 75.

45 *Cyrel v National Bank of Vanuatu* [2008] VUSC 55. A purchaser had acquired beachfront land for undervalue and was then "able to successfully subdivide the land into 110 lots which he [began] selling for between AUD 50,000 and 120,000 each".

46 This is evident in the areas of Pango and Mele/Devils Point, which form two sides of the bay where the capital, Port Vila, is situated.

land clearance has not been properly assessed, the probabilities of erosion, damage to coral reefs and oceanic resources and the pollution of the freshwater lens are highly likely.⁴⁷

Some of the current issues relating to land are not new, such as boundary disputes and conflicting claims as to who the customary owners are. Others are attributable to the legacy of introduced laws, especially leasehold laws drawn from a very different socio-economic context, which are poorly understood by customary owners. Other issues are of more recent origin. These include: the emergence of unregulated middle men or estate agents – invariably non-indigenous people – who are increasingly marketing land to non-indigenous buyers; the introduction and use of the *Strata Titles Act*, which has enabled developers to develop and sell sub-divisions avoiding the safeguards of the *Land Leases Act*;⁴⁸ and increasing emphasis on private sector economic growth, particularly in tourism, driven not only by the Vanuatu government's own agenda⁴⁹ but also the joint-development cooperation strategy agreed on between Australia and Vanuatu. Instability elsewhere in the region, notably in Fiji and Solomon Islands, combined with Vanuatu's lack of other natural resources, has seen an increase in tourism and demand for tourist resorts and an influx of foreign visitors who may be tempted by the estate agents to buy land in Vanuatu.⁵⁰ At the same time, increases in the cost of living, especially the cost of imported goods and fuel, the diminishing possibility for many urban families of growing their own food, together with the virtual impossibility of raising any mortgage finance against land held under customary tenure, has prompted a number of customary owners to sell land under leases and use the money for small business enterprises.

The consequence is land pressure, especially on Efate, the island home to the capital Port Vila. Land survey maps indicate that virtually the whole island's perimeter is under leasehold, with plots extending a considerable way inland towards the rocky, inaccessible and formerly volcanic interior. Public access to beaches and the shoreline for the purposes of leisure, launching canoes and fishing is being increasingly curtailed or subject to payment for access. As development of leasehold sub-lots occurs, commercial and subsistence agricultural land, including informal gardening land, is under stress.

Although there is legislation in place to control development, for example the *Physical Planning Act*, the pre-independence *Foreshore Development Act*⁵¹ and the *Environmental Management and Conservation Act*,⁵² these are routinely flouted,

47 See eg PA Kingston, *Surveillance of Drinking Water Quality in the Pacific Islands: Situation Analysis and Needs Assessment* (World Health Organisation, 2004).

48 *Land Leases Act* [Cap 163] 1983 (Vanuatu).

49 See Government of the Republic of Vanuatu, Department of Economic and Sector Planning and Ministry of Finance and Economic Management, *Priorities and Action Agenda 2006–2015: "An Educated, Healthy and Wealthy Vanuatu"* (2006).

50 It has, for example, been stated that "the year 2005 was perhaps the most active year in Vanuatu real estate history. It was the peak of the boom in real estate not only in Vanuatu but worldwide ... the highest demand was for coastal beach front land for holiday homes and tourism projects": *Cyrel v National Bank of Vanuatu* [2008] VUSC 55.

51 *Foreshore Development Act* [Cap 90] 1975 (Vanuatu).

52 *Environmental Management and Conservation Act* [Cap 283] 2002 (Vanuatu).

either because the penalties for infringement are negligible for developers⁵³ or because there are insufficient administrative resources to enforce the legislation and lack of coordination between administrative bodies.⁵⁴ This is particularly evident in the case of the *Environmental Management and Conservation Act*, which lacks any provision enabling officers to enter land or premises without permission to inspect for compliance with the Act.⁵⁵

Despite years of (aid-funded) investment in improving governance, enhancing the quality and delivery of government services and developing the quality of and procedures for accountability and transparency, the role of the executive and senior officers in land transactions continues to be troubled by incompetence, corruption and inconsistency.⁵⁶ The Minister of Lands continues to exercise power to grant leases under the *Land Reform Act*, even when disputes over title are ongoing. Despite admonitions from the court as to the way in which the Minister should exercise his powers,⁵⁷ the political framework of Vanuatu makes it highly probable that Ministers found to be in breach of their duties will nevertheless return to power.

AUSTRALIAN INTERVENTION

The history of Australian interest and intervention in Vanuatu pre-dates independence.⁵⁸ Indeed one of the factors that triggered British involvement in what was then the New Hebrides was concern by Australian colonists that France might use the country as a penal settlement⁵⁹ and that French Catholic missionaries might get a stronger foothold in the battle for heathen souls than the

53 For example, a fine of 200,000 vatu for infringing the *Foreshore Development Act* [Cap 90] 1975 (Vanuatu).

54 This is evident in the *Physical Planning Act* [Cap 193] 1986 (Vanuatu).

55 See *Kakula Island Resorts Ltd v Government of the Republic of Vanuatu* [2006] VUSC 3, although the orders made in that case were subsequently set aside in *Government of the Republic of Vanuatu v Kakula Island Resorts Ltd* [2008] VUCA 5 (Court of Appeal).

56 See eg *Solomon v Turquoise* [2008] VUSC 64. Two successive Ministers of Lands granted negotiation certificates to two different sets of custom owners within the same year. Although allegations of bribery were not proven, the court held that "the Minister's attitude was extraordinary. His power to act under s. 8 of the *Land Reform Act* is given to him to exercise in the interests of custom land owners: see 8(2)(b). It can hardly be acting in the interests of a custom land owner to grant a 75 year lease of his land without even consulting the presumptive owner, particularly when he had made it clear to the Minister that he did not want a lease granted".

57 See eg *Ifira Trustees Ltd v Kalsakau & Others* [2006] VUCA 23, in which it was held: "The decision maker must undertake the task conscientiously and independently weighing all matters which are relevant and ignoring those which are irrelevant and the decision maker must faithfully apply fair and proper processes and procedures ... Section 8, as an example, is not a licence for a Minister to make any decision that he likes about the care and control of disputed land pending the resolution of that dispute. A Minister exercising this power can only reach a proper and lawful conclusion after he has weighed and assessed all matters which are relevant."

58 See generally D Scarr, *Fragments of Empire: A History of the Western Pacific High Commission 1877-1914* (Australian National University Press, Canberra, 1967).

59 As it had done with New Caledonia. See generally R Aldrich, *France and the South Pacific since 1940* (University of Hawaii Press, 1993); R Aldrich, *French Presence in the South Pacific 1842-1940* (University of Hawaii Press, 1990).

Presbyterian missions operating in the Australian colonies. Moreover it was the recruitment of Pacific islanders as labourers in the sugar and cotton farming areas of Queensland and New South Wales and the infamous practice of “blackbirding” in 1863-1904 that prompted some of the earliest legislation directed at protecting Pacific islanders.⁶⁰ Although Vanuatu was never directly under the control of either Australia or New Zealand – compared to, for example, Nauru or Cook Islands and Niue – British government presence in the Anglo-French Condominium of New Hebrides from 1906 to 1980 ensured that Australian interests were not neglected, especially as many of the planters who settled in the country came from or via Australia.

In the period post-independence, Australasian involvement in Vanuatu, as in a number of other Pacific island countries, has been via Pacific agencies such as the Pacific Forum, through trade agreements and through aid funded projects. More recently, there has been both direct and indirect involvement in land issues through AusAID funded projects. For example, in 1995-2000 AusAID funded a Vanuatu Land Use Planning Project. In 2006 the Australian government identified the fundamental reform of land tenure and administration as a key area of concern for its AID programme. This was articulated in the Pacific Land Program, a four-year project directed at land reform in the period 2009-2012.

The year 2006 saw the first National Land Summit,⁶¹ with a theme of “Sustainable Land Management and Fair Dealings to Ensure Progress with Equity and Stability”. The aim of the Summit was to arrive at a list of resolutions that would drive future land policy. Three key areas of concern were identified: the ownership of land; the need for fair dealings in respect of land; and issues relating to sustainable development in relation to land. A list of 20 resolutions was compiled. In summary these were that:⁶²

1. The law should recognise and give effect to communal ownership of land.
2. The central and provincial governments and the National Council of Chiefs should work together to document the custom (*kastom*) that determined ownership, land policies, boundaries and land dealings.
3. Government bodies should seek greater awareness of the existing (plural) legal and economic framework.
4. The current law of leases should be reviewed.
5. Lease agreements should be made comprehensible and inclusive in their negotiation and agreement.
6. Certificates of negotiation should be subject to increased scrutiny and publicity, especially at the local level.
7. The Minister should cease to have the power to approve leases over disputed land.

60 *Pacific Islanders’ Protection Act 1872; Polynesian Labourers Protection Act 1868 (Qld).*

61 The decision to do so stemmed from the National Summit for Self Reliance and Sustainability held in 2005 and the National Land Summit was preceded by provincial land summits. It was made possible through donor funding.

62 The original 20 resolutions passed at the Summit were amended slightly by the Council of Ministers prior to endorsement by the Council in November 2006. In particular, a proposed total ban on the power of the Minister of Lands to administer custom land and grant leases was modified to allow him to do so in certain circumstances. However, to date no restriction of any sort has been put in place.

8. Abuses of the use of strata title should cease and landowners should be involved in their approval.
9. Real estate agents should be regulated.
10. Lease rental and premium rating should be reviewed and reformed.
11. Pre-approval conditions directed at ensuring sustainable development should be put in place.
12. Physical planning and zoning laws should be strengthened and a sub-divisions policy adopted at national and provincial level.
13. Efforts should be made at all levels and by all sectors of the community to raise awareness of sustainability issues.

In addition to these resolutions, it was urged that a moratorium be imposed on sub-divisions, and that the exercise of the power of the Minister to deal with land subject to dispute be removed. The Council of Ministers endorsed these suggestions with some modification to the curtailment of the Minister's powers.

A National Land Steering Committee was formed in early 2007 and the government of Vanuatu undertook to seek funding, which was secured from Australia and New Zealand.⁶³ An initial AusAID funded review was published in March 2007.⁶⁴ Following this, tenders were offered for aid-funded consultancies to address land reform initiatives identified as necessary in the review and for which the review had prepared scoping notes. While some of these initiatives were directed at the issues identified in the resolutions, others were by and large cosmetic rather than fundamental.⁶⁵

The 2007 review recognised that the scale of land alienation in recent years was threatening the country's social and political stability: the need to review Vanuatu's land policies, laws and administration was pressing. Some of the extreme measures considered were: a continued moratorium on land alienation; investigations into the legality of current land dealings; the implementation of retrospective enforcement of zoning and planning laws with the possibility of forfeiture of leases and prosecutions for breach; retrospective amending legislation; and compulsory acquisition of land.⁶⁶ While recognising the flaws of the legal and administrative framework, the review highlighted the need to address

63 New Zealand funded a new data base programme for land lease records and is addressing issues relating to the *Customary Land Tribunal Act [Cap 271] 2001* (Vanuatu). Pacific countries and their donor partners are broadly governed by the principles of the *Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Alignment, Results and Mutual Accountability* (Organisation for Economic Co-operation and Development, 2005).

64 C Lunnay et al, *Vanuatu: Review of National Land Legislation, Policy and Land Administration* (AusAID, 2007).

65 They included, for example, review of the *Strata Titles Act [Cap 266] 2003* (Vanuatu), proposals for sub-division controls and the protection of foreshore reserves, an audit of compliance with the *Land Leases Act [Cap 163] 1983* (Vanuatu), a zoning map for Luganville and the raising of public awareness.

66 In fact, to date there have been no legislative changes either by amendment to existing laws or the introduction of new ones. The only change that has occurred – to the *Land Leases Act [Cap 163] 1983* (Vanuatu), was already in the pipeline. There is power to compulsorily acquire land both under the Constitution and the *Land Acquisition Act [Cap 215] 1992* (Vanuatu). In April 2009 I was advised that a Zoning Plan for Luganville had been draw up, but this had not been made public any more than possible reforms to the *Strata Titles Act [Cap 266] 2003* (Vanuatu), which were also rumoured to have been drafted.

security of land tenure of customary owners, including the adoption of measures to protect customary owners against exploitation.

As a step towards a national land law, the review recommended a number of initiatives aimed at clarifying the present state of affairs, such as: an audit of existing land leases regarding compliance with existing law; amendment of existing laws to address specific anomalies – for example, amendment of the *Strata Titles Act* (Vanuatu) and a requirement that middle men be brought under the *Foreign Investment Act*; improvement in administrative efficiency, transparency and coordination between the different departments involved; identification of community boundaries; zoning for Luganville; and the introduction of controls for sub-divisions. It was thought that these short-term interim initiatives could be completed within 12 months.⁶⁷

In June 2008 an AusAID funded concept document was drafted and reviewed in August of the same year.⁶⁸ In September 2008 an AusAID design mission to Vanuatu held a number of workshops and undertook field trips around Vanuatu. This resulted in a Draft Design Document in mid-October 2008, which was finalised at the end of that month, and the publication of the Vanuatu Land Program Design Document in February 2009.

WHERE NEXT?

The Land Program Design Document of 2009 states that current land development is driven by government need for public land (to which little attention has been given) and “demand by international investors for residential or tourist development”.⁶⁹ Key concerns of any land policy must be security of tenure, sustainable management and use of natural resources (including land), equitable distribution of benefits and effective legal frameworks. From an external perspective, however, the top of the list is “economic development”. Consideration of donor reports and policy documents and an analysis of current case law from Vanuatu points to an inherent tension. In order to attract investors, Vanuatu must facilitate investment in land. Public sector services such as the registration of leases, the surveying and valuation of land and the settlement of disputes must be improved to be more “customer-orientated”. The customers, however, are not for the most part indigenous customary owners, but overseas purchasers. Those that will benefit from a quicker turnover of land will be developers and middle men. The push to “smooth the way for investors” could lead to more, rather than less, temptation to take short cuts. If the customary interests of groups, rather than individuals, are to be preserved, and public rights, such as the right of access to sea shores, are to be protected, as well as ensuring the long-term environmental sustainability of development, then more, not less caution, may be necessary. Procedures may need to be more stringent, inspections more frequent and

67 It is rumoured that a pilot Lease Compliance Audit, amendment to the *Strata Titles Act* [Cap 266] 2003 (Vanuatu) and a zoning plan for Luganville have been completed but, to date (April 2009), none of the outcomes have been published.

68 DE Swete Kelly, D Larden and K Lyons, *Land for Progress and Equity – A Concept Document for Future Australian Assistance to Land Reform in Vanuatu* (AusAID Vanuatu Program, 2008).

69 Executive Summary, p ii.

sanctions for non-compliance with, for example, land use or environmental impact assessments, more draconian. Perhaps it should be harder to obtain leases over customary land, not easier.

Although the Vanuatuan government has approached Australia for assistance with land sector reform, to date none of the resolutions of the National Land Summit have been addressed. Moreover, the proposed time frame indicated under the Vanuatu Land Program 2009 is cautious, with a six-month period of inception envisaged, then an initial five-year program effectively starting in late 2009 or early 2010, with no planned legislative reform. This would be followed by a further five-year period where legislative reform might occur. It is difficult therefore to see how the proposed program deals directly with any of the resolutions of the National Land Summit.⁷⁰

CONFLAGRATION PROSPECTS

Land played a pivotal role in the movement towards independence. A 1971 circular sent out by the Vanua'aku Pati, who were beginning to lobby for political change, stated:

Our aims informing a National party are to preserve the New Hebridean people; their culture and their ways of life are in immediate danger of large scale settlement by Europeans ... these pieces of land have been sub-divided and resold. This means that a lot of Europeans will be coming to settle on them.⁷¹

The same concerns remain today. In 1971, land was a political issue triggering political change, because indigenous New Hebridians were excluded from participation in the decision making process. Whether ordinary citizens have really achieved a degree of participation that empowers them to influence land policy in their country is questionable. It has been recognised that:

Land is a flashpoint for conflict throughout the Pacific. Custom land tenure and management practices have evolved within largely subsistence societies and hence increasing pressures from external development and the "commoditisation" of land have resulted in significant conflict.⁷²

As earlier indicated, the 2009 report states that current land development is driven by the government's need for public land and "demand by international investors for residential or tourist development".⁷³

Vanuatu has a total land area of approximately 915 square kilometres. In 1999 the population of Vanuatu was just under 186,678 with an average growth rate of 2.6 per cent, although this increased to 4.2 per cent in urban areas.⁷⁴ At the time of the 1999 national census approximately 40,000 people lived in the urban areas of Port Vila and Luganville. It is estimated that the population of Port Vila will be

70 See comments by D Paterson, *The Independent* (Port Vila), 19 October 2008, 31.

71 Van Trease, n 6, p 207.

72 Vanuatu Land Program Design 2009, p 55.

73 Executive Summary, p ii.

74 Vanuatu National Statistics Office, *Demography* (1999) <<http://www.spc.int/prism/Country/VU/stats/SOCIAL/DEMOGRAPHY/demog-sum.htm>> viewed 24 September 2009.

60,000 by 2016.⁷⁵ Although it had previously been estimated that the 2009 population was 218,519, with 30.7 per cent under the age of 14,⁷⁶ the 2007 Agricultural Census indicated that the population at its census date was 221,506.⁷⁷ The main area of population density continues to be in and around the capital, Port Vila, which attracts two-thirds of all urban dwellers (approximately 41,050 people).

Although there are hopes that the construction of a tar-sealed perimeter road around the capital's island Efate, under the Millennium Development Plan, will disperse the population density and provide more opportunity for development elsewhere, at present the global economic recession has delayed this project, which is already behind schedule and over budget. In any case, it is unlikely that people will disperse from Port Vila itself and the development of other centres may simply see some of the problems experienced around the capital repeated elsewhere, as formerly remote areas become more accessible.⁷⁸

One of the policy objectives indicated in the 2007 review was an appraisal of needs for customary land. At present, the land to population ratio is 1:0045 square kilometres. Although Vanuatu is "land-rich" compared to many Pacific island countries (for example, Nauru, Niue, Kiribati and Tonga) considering that the centre of many islands is steep, inaccessible and difficult to cultivate and that some islands are so small or low lying as to be unviable for human occupation, land pressure in the medium- to long-term seems inevitable.

Without natural mineral or timber resources, only a small fishing fleet, minimal manufacturing or retail output and heavy dependency on imports, Vanuatu is ranked among the poorest countries of the Pacific. Since 1995 Vanuatu has been on the United Nations least developed country list. It was 123rd on the United Nations Development Programme Human Development index in 2008.⁷⁹ Clearly, Vanuatu needs to improve its economic development – although it is arguable whether it will ever be able to be non-aid-dependent. Unlike some Pacific countries it receives little in the way of remittances from islanders overseas as the ni-Vanuatu have limited migration opportunities to Australia, New Zealand or the United States. Its main sources of revenue are off-shore finance and tourism.

As a Melanesian country, Vanuatu lies within the "arc of instability", an area recently described as "a huge disaster".⁸⁰ "Islandism", lack of strong central government and the diminishing influence of traditional authority in urban areas,

75 Commonwealth of Australia, *Pacific 2020: Challenges and Opportunities for Growth* (AusAID, 2006), 30.

76 Central Intelligence Agency, *The World Fact Book* (2009) <<https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html>> viewed 24 September 2009.

77 Vanuatu National Statistics Office, *2006 Census of Agriculture - Preliminary Report* (2007) <http://www.spc.int/prism/Country/VU/stats/P_releases/Adhoc/Agcensus_rept.htm> viewed 24 September 2009.

78 An example is the rapid development of sub-division land at Havannah Harbour, one of the earliest sites of colonial settlement historically and now touted as being only ten minutes from Port Vila – once the road is made.

79 Human Development Reports, *Human Development Indices: A Statistical Update 2008*, United Nations Development Programme <<http://www.hdr.undp.org/en/statistics>> viewed 25 March 2009. Although now eligible, Vanuatu is resisting coming off the UN least developed list as it will lose out on aid.

80 G Sheridan, "Melanesia a Huge Disaster", *The Australian*, 20 April 2006.

together with lack of opportunity for young people, few avenues of escape by outward migration and the high cost of living in urban areas, are all factors that could combine to trigger unrest.⁸¹ Add to this the increasingly apparent disparity of wealth between "white immigrant residents" and indigenous residents and between the majority of the population and a developing urban, indigenous middle class who in particular have benefited from development on their land.⁸² Pressure on space in and around Port Vila has led to a concentration of squatter settlements that frequently lack basic amenities, where tenure is precarious and where continued occupation may be subject to political or other support for the person who claims to be the customary landowner. Often outside the jurisdiction of the municipality but also removed by distance from the jurisdiction of island chiefs, law and order in such settlements relies on the fluctuating, and frequently challenged, authority wielded by local, urban chiefs.⁸³

The demographic trends in Vanuatu's population should not be ignored. In 1973, JT Fleming was appointed as the Condominium Land Tenure Adviser. His task was to produce a land code. Van Trease notes that "he failed to take into account local perceptions".⁸⁴ Fleming did, however, observe in his analysis of the land question:

There appears to be little antagonism towards the presence of European settlers or their occupation of land ... However, my discussions were usually with the older and presumably more conservative New Hebrideans. It must not be supposed that their successors, a younger generation, will have the same degree of tolerance and understanding which accepts the existence of European settlers.⁸⁵

His comments continue to have resonance today and governments and aid donors funding development programmes should take note.

Besides the demographic context it is clear that there are obstacles to overcome if change in land dealings is to occur. The Constitution provided that "the rules of custom" were to form the basis of ownership and use of land. However it is evident from the jurisprudence of the courts, including continuing decisions from Island Courts on land matters, that custom is not without contention. It is also clear that abuse of powers in relation to land, under the cloak of custom, are endemic and range from the assertion of a customary owner to be entitled to

81 See M Morgan, "Vanuatu 2001-2004: Political Will and the Containment of Unrest" in D Rumley, V Forbes and C Griffin (eds), *Australia's Arc of Instability: The Political and Cultural Dynamics of Regional Security*, (Springer, The Netherlands, 2006), pp 215, 222.

82 Members of this group have also often had the benefit of tertiary education and overseas travel and frequently have political influence.

83 See J Mitchell, "Violence as Continuity: Violence as Rupture – Narratives from an Urban Settlement in Vanuatu" in S Dinnen and A Ley (eds), *Reflections on Violence in Melanesia* (Hawkins Press/Asia Pacific Press, 2000), pp 189, 191.

84 Van Trease, n 6, p 218.

85 JT Fleming, "Land Tenure in the New Hebrides: Policy Proposals" (1973) *British Residency Miscellaneous Papers*, 6-7.

ignore the claims of family and clan and deal with property without regard to the views of the group,⁸⁶ to abuse of office by Ministers and members of the Lands Department.⁸⁷

The rate of land alienation under leases has demonstrated that the government has not observed its constitutional duty under art 79, which requires government consent for land transactions between an indigenous citizen and non-indigenous citizen or non-citizen. In granting assent, the government must take into account whether the transaction is prejudicial to the customary owner or owners of the land, the indigenous citizen who was not the customary owner, the community on whose locality the land was situated or the Republic of Vanuatu. Poor policing of land leases, inequality of bargaining powers, misrepresentation, lack of understanding, bribery and corruption combined with inefficiency and apathy conspire to ensure that if the present situation continues the security of customary land tenure, leaseholders and the nation will be in jeopardy.

One of the greatest weaknesses that has emerged from the National Land Summit has been the failure of government to put in place land management measures that put the welfare of the people of Vanuatu first. Much could have been done with relatively minor effort. For example, despite the approval of the proposal by the Council of Ministers, a moratorium on sub-division of land was not implemented nor was a hold placed on the conversion of expired agricultural leases to residential use. Similarly, while minor amendments would have sufficed, the *Strata Titles Act [Cap 266] 2003* was not amended,⁸⁸ nor was a proposal to modify the powers of the Minister ever introduced in Parliament. Within months of the National Land Summit, a proposed Zoning Plan for Luganville was drawn up in the Planning Department of the Lands Department – what happened to it? Certainly there may be a case for more extensive review of the existing laws, including customary law, in order to arrive at a national land law, but, more fundamentally, there needs to be a change of mindset on the part of the Vanuatu government and aid donors. The former needs to listen to the people of Vanuatu and drive the process with their interests in mind. The latter needs to consider whether it can really make a positive contribution if it is trying to juggle the needs and interests of (largely Australian) investors and the enhancement of customary land tenure. Until these issues are addressed it is questionable whether putting in place new laws, or more sophisticated forms of land administration, will address the consequences of uncontrolled land alienation now confronting Vanuatu. In particular, it is doubtful that reliance and dependency on donor aid and donor programmes are the way to address land issues raised by the people of Vanuatu. Until and unless the government can be held accountable for its failure to observe

86 See eg *Noel v Toto* [1995] VUSC 3; *Noel v Champagne Beach Working Committee* [2006] VUCA 18.

87 See eg D Paterson, “*Trustees Ltd v Family Kalsakau* [2006] VUCA 23; *Vanuatu Copra and Cocoa Exporters Ltd v Maison De Vanuatu* [2007] VUCA 24: Two instructive cases for ministers of government, their political advisers, and public servants” (2008) 12(1) *Journal of South Pacific Law* 128-137.

88 It is rumoured that these amendments have now been drafted – some three years after the National Land Summit.

the spirit of art 79 and ensure that land dealings are in the best interests of landowning communities and the country, it is difficult to see how progress can be made or conflict avoided.

CONCLUSION

The report "Making Land Work" suggests that there are three ways forward. The first is to do nothing – a minimalist approach, which accepts the *status quo* including poor land administration, lengthy delays in resolving land disputes and inequality of benefits from land leasing. The second is to allow unchecked privatisation of land and with it the associated risks of inequality and social conflict, landlessness and poverty. The problem that confronts Vanuatu is that it suffers from the consequences of a combination of both these first two approaches. The third possibility is to link customary and formal institutions, creating bridges across what are effectively, in Vanuatu at least, two parallel systems – introduced law and customary land tenure. But can this be done, or are the values that inform the two systems too diametrically opposed to reach this middle ground?

One of the striking aspects of the 2006 National Land Summit was the extent of local involvement and participation, not just in the Summit but also in the pre-summit provincial meetings. The momentum leading to the Summit and thereafter raised awareness of land issues among ordinary citizens. Moreover, the resolutions emanated from the people of Vanuatu. Putting in place measures to address those resolutions is however a major task. Indeed it is recognised in "Making Land Work" that improvement in land policies is a process that could take decades rather than years in Pacific island countries. If new national land policies that put security of land tenure at the forefront while still allowing dealings in customary land are to be put in place, then those who have benefited most under the lack of any such policy may have to be prepared to forego those benefits. In particular the powers of the Minister of Lands will have to be curtailed and the activities of negotiators, estate agents and land developers properly regulated and policed. Urban, provincial and national planning and zoning policies will have to be developed which are coherent and formulated with the consensus of all stakeholders. This will require considerable cooperation and some altruism on the part of those who represent areas which benefit most from development at present.⁸⁹ It is also important that in this process the views of "grass roots" people including those whose voices are often overlooked – women and young people – are taken into account as any development is likely to have an immediate and long-term environmental and social impact on them. Further, legislation designed to ensure sustainability and to minimise negative environmental impact needs to be enforceable and the sanctions need to be meaningful.⁹⁰ This not only needs resources, capacity and coordination between the different personnel and departments responsible, but also political will. A legal framework by itself is not enough and aid-funded projects will not work in the long run unless the government and people of Vanuatu adopt them as their own.

89 For example the customary land owners of Ifira who own most of the land in the immediate vicinity of the capital and also have considerable political influence.

90 See eg the *Foreshore Development Act* [Cap 90] 1975 (Vanuatu); *Environmental Management and Conservation Act* [Cap 283] 2002 (Vanuatu).

If Vanuatu is to achieve economic growth without sacrificing its own people it needs to rapidly improve day-to-day regulation of land alienation and, in particular, to weigh the long-term advantages and disadvantages of alienating land to foreigners. More land cannot be made available for development if it is also crucial for food production, shelter and community stability, including security of tenure and basic standards of living for the many peri-urban squatters. Where land is developed to provide local employment, to support and service the tourism industry, or for agricultural purposes that will feed the people of Vanuatu and produce a surplus for export, then such alienation is clearly advantageous. Where this is not the case, then consideration should perhaps be given to adopting measures similar to those found in other parts of the world, such as the Channel Islands where land can only be alienated to citizens, or nationals, or those born in the country. Spain has also implemented a variety of land protection measures, such as restricting the use of coastal land for residential tourist development. Other approaches could include; only allowing land to be leased for approved joint-ventures in which customary owners are stakeholders; or disallowing development on coastal land that do not incorporate rigorous and compulsory protective covenants and easements to secure customary rights and ensure inter-generational equity. While these sorts of measures may or may not be appropriate for Vanuatu, it is time that those who formulate land policy, the government of Vanuatu in collaboration with aid donors, considered the broader, long-term picture. The alternative is likely to lead to a situation where a very little spark could cause considerable damage.

Publication 6

‘Selling the Land: should it stop. A case-study from the South Pacific’, in M. Dixon (ed) *Modern Studies in Property Law* (2009) Hart Publications, Oxford, 289-311

Selling the Land: Should It Stop?

A Case Study from the South Pacific

SUE FARRAN*

I. INTRODUCTION

CENTRAL TO CONTEMPORARY property law, certainly in the United Kingdom but also in many other common law jurisdictions, is the idea of land as a marketable commodity, and that the role of property law is to facilitate this. Indeed so commonplace is the notion that land should be freely alienable that the wisdom of the underlying policy or philosophy is rarely questioned. However, there may be places or circumstances where land sale and purchase is not always beneficial and where the common law assumptions need to be scrutinised. This paper looks at one case where the introduction of common law conceptions and values not only is at odds with indigenous perceptions and values in relation to land, but where the continued pursuit of the marketability of land could have grave consequences.

The case study is based on empirical and academic research undertaken in the Pacific island country of Vanuatu. Many of the dilemmas encountered here are experienced in other parts of the Pacific and the wider developing world.¹ Moreover, many of the features of this case study are illustrative of phenomena which are or have occurred elsewhere, from the fishing villages of Cornwall to the coastal belt of Spain and the Mediterranean. At a time when house prices and mortgage finance seem to be key indicators of national and global economies it is hoped that this paper may provide food for thought and a moment to reflect on the assumptions we make about land as a market-place item.²

* Senior Lecturer, University of Dundee; Visiting Lecturer University of the South Pacific.

¹ See eg K Dixon, 'Mobilising Customary Land in Papua New Guinea the Melanesian Way' (2007) 31 *Harvard Environmental Law Review* 219–77.

² Since writing this paper the shaky foundations on which such economies are based has become self-evident.

II. A CASE STUDY FROM THE SOUTH PACIFIC

Land has become a tradeable commodity with a concomitant demand for easy transferability of title.³

One of the central features of contemporary property law is the way in which it operates to facilitate property transactions, to protect property interests of third parties against purchasers and to protect purchasers. The idea of land as a marketable commodity is so commonplace today that it may be easy to lose sight of the consequences of land alienation for the vendors.

These may be of particular concern where land or real estate is the sole or prime resource available for alienation, as is the case in some of the least developed or underdeveloped regions and countries of the world. Where people have the opportunity to relocate and reinvest the material gains of land alienation the consequences may not be entirely negative. Where, however, this is not possible, and there are pressures to engage in a cash economy and attract inward investment in order to participate in global markets, then the negative consequences may be greater, especially if a high percentage of land alienation is to outsiders or foreigners and land is acquired as second home/holiday/retirement property, with little or no intention to generate employment or engage in commercial activity.

In the South Pacific land alienation is not a recent phenomenon. Indeed the region has a history of dispossession of land, first by warring clans and chiefdoms and later, as contact with westerners grew, through dispossession by planters, colonial government and grants to missionaries and churches. In many of the island countries of the region one of the key motivating factors in the period leading up to independence was the desire to reclaim the land. Certainly this was the case in the islands of the New Hebrides which were to become Vanuatu, the country with which this case study is concerned. Here, in the decade before independence it was estimated that over half the country had been alienated, primarily as agricultural land to foreigners during the years of Anglo-French colonial government.

Consequently, when the Republic of Vanuatu gained its independence in 1980, all land was restored to custom owners, title to which was to be determined by diverse custom laws according to the provisions of the written constitution which conferred new national status on the country as the Republic of Vanuatu.⁴

³ G Ward and E Kingdom (eds), *Land, Custom and Practice in the South Pacific* (Cambridge, Cambridge University Press, 1995) 37.

⁴ Constitution of the Republic of Vanuatu arts 73–77.

III. VANUATU: EFATE

The Republic of Vanuatu is situated in the Pacific Ocean. There are approximately 80 islands in Vanuatu, not all of them inhabited. They vary considerably in size and population. Most are volcanic in origin with steeply rising interiors. Consequently, population density tends to be greatest along the coastal belt and near inland waters.

As an independent state and member of the family of nations, the Republic of Vanuatu is a young nation. In fact it is on the United Nations list of least developed nations of the world.⁵ Its economy is based primarily on small-scale agriculture, which provides a living for 65 per cent of the population,⁶ fishing, financial services (offshore) and tourism. Nevertheless it aspires to development, to membership of the World Trade Organization and other regional and international trading frameworks. To do this not only must it put in place the necessary facilitating legal framework but it must also attract inward investment. One way of doing this is to attract foreign investment in land, by encouraging either tourism operators such as hotel chains, or individuals seeking second or holiday homes.

This case study focuses on one island: Efate. This is where the capital, Port Vila, is located. Efate is the third largest island in the archipelago of islands which make up Vanuatu and has a land mass of approximately 915 square kilometres. This island has the highest population concentration and largest urban development in the country.

By air the island is around three hours from the east coast of Australia, and the same from Auckland, New Zealand. The country's international airport is located here and passenger cruise ships make frequent visits, usually stopping for just a few hours to disgorge their passengers for a quick look at Port Vila, and perhaps some of the island. Tourism is an important revenue source for Vanuatu. Some visitors come and want to stay. Others come because they are on contracts with various aid agencies dedicated to the 'improvement' of the country. They too may want to stay, perhaps just for a little while, perhaps for longer. They are keen to acquire homes in islands made famous by musicals, Michener and more recently reality television. They are tempted by the glossy advertisements in the airline magazine, by the photos of beach frontage and aquamarine seas in estate agents windows in the main street of the capital, and by the cachet of having an 'island home'. They are used to the idea of second homes and the philosophy of 'if you want it, buy it'.

⁵ United Nations list of Least Developed Countries <http://www.un.org/special-rep/ohrrls/ldc/list.htm> (18 October 2008).

⁶ Some sources claim this percentage to be as high as 80. See opening speech at the National Land Summit by the Minister of Lands.

In 2000–2001, while based at the University of the South Pacific in Vanuatu, I undertook a field study into the extent of land alienation on Efate. Research into registered land lease records indicated that the approximate total land area of the island held under lease was 24,205h 46a 95ca. This land area—which excluded the urban area of Port Vila—represented about 25 per cent of the land area of the island but, importantly, covered a considerable percentage of the coastal land. These findings received considerable local publicity at the time and were presented at a public conference in Port Vila. In 2007, with the assistance of funding from the Society of Legal Scholars, I returned to Vanuatu to find out what developments there had been. This paper draws on that research.

IV. LAND, CUSTOM AND LAW

The ethno-centric perception of land held by many visitors to Vanuatu is different from that held by most indigenous inhabitants (ni-Vanuatu). To them, land is everything: 'It is a place where ni-Vanuatu can find food and his other basic needs. Land is linked with culture and family relationships. Many people talk about land as our mother'.⁷

Bonnemaison, writing in 1984, stated:

In Vanuatu custom land is not only the site of production but it is the mainstay of a vision of the world. It represents life, materially and spiritually. A man is tied to his territory by affinity and consanguinity. The clan is its land, just as the clan is its ancestors. The clan's land, its ancestors and its men are a single indissoluble reality—a fact which must be borne in mind when it is said that Melanesian land is not alienable.⁸

As has been indicated, by the time Vanuatu gained independence a considerable area of land had been alienated. Land clearance and especially incursion into native bush land or 'dark bush' led to insurgency and the rise of political parties supporting the move towards independence.⁹

As so much land had been alienated transitional provisions had to be put in place. Foreigners who had acquired freehold titles and were in occupation no longer held such titles, as freehold was abolished entirely. However, these settlers could remain in possession of the land they occupied until they were either paid compensation by the custom owners, or granted a lease, or a combination of these if the custom owners wished to reclaim some, but

⁷ R Nari, Director-General of the Ministry of Lands, address to the National Land Summit, 25–29 September 2006.

⁸ J Bonnemaison, 'Social and Cultural Aspects of Land Tenure' in Peter Larmour (ed), *Land Tenure in Vanuatu*, (Port Vila, Vanuatu, Institute of Pacific Studies, University of the South Pacific, 1984) 1–2.

⁹ Represented in particular by the *Nagriamel* movement in Santo and the New Hebrides National Party.

not all, the land.¹⁰ Where the land was not occupied—and there were many absentee planters, then the land reverted to the custom owners who had originally alienated it. Any custom owner wishing to enter into a lease with a tenant had to be recognised as the appropriate person or persons to negotiate such a lease. There were, however, problems. After a period of over 100 years, it was not always possible to trace the custom owners of land, most of whom had had to move elsewhere once planters took over, and who in any case may not have cultivated the land but simply used its natural resources. This led to disputed claims. The Constitution, envisaging such possibilities, provided that where title was in dispute or unclear then the land vested in the appropriate representative of the government—the Minister of Lands, until the dispute was resolved.¹¹ The Minister in the interim had the power to manage the land. A further problem was that there was no national law governing leases. Any leases entered into were therefore governed either by custom, or by French or English law in force at the date of independence, as provided for in the constitutional rules on interim laws. It was not until four years after independence that the Land Leases Act (Cap 163) was put in place. Since then other legislation has followed to facilitate land alienation, for example, in the 1990s restrictions on sub-division were lifted and in 2000 Strata Title was introduced.

No time limit was provided in the various legal provisions which were intended to transfer title back to customary owners who had alienated the land, and govern the payment of compensation or the granting of leases to foreigners or non-customary owners who were in occupation. This had a number of consequences, some of which are still of significance 28 years after independence. First it seems likely that a number of settlers remained in occupation in a legal limbo, not yet having a lease but being no longer entitled to hold the freehold title to land.¹² Where agricultural leases were granted—and the lands records indicate that these were the majority of leases in the 1980s—the lease was for a much shorter period than the maximum permitted under the law, and tended to be for 30 or 40 years. These leases will therefore be reaching maturity in the next decade, if not sooner, which is a matter of some concern, as will be indicated. Secondly, because leases had to be entered into by the appropriate, original alienator or his descendants, it was often unclear who these were. In a number of cases title had been acquired by foreigners by unscrupulous means.¹³ Although

¹⁰ The Land Reform Act (Cap. 123) s 3. This replaced a Joint Regulation passed before independence. Joint Regulations were laws passed by the Anglo-French Condominium government—usually for indigenous people.

¹¹ Constitution of Vanuatu art 87(1).

¹² The fact that a number of leases are backdated—some to 1980—suggests that this may have been the case.

¹³ See H Van Trease, *The Politics of the Land in Vanuatu* (Institute of Pacific Studies, University of the South Pacific, 1987).

the Joint Court, which was in place under Anglo-French Condominium rule prior to independence, had endeavoured to sort out disputes relating to title in the years 1906–80, and had indeed resolved a number of cases, it nevertheless remained the situation that at independence there was land without ascertainable custom owners.¹⁴ The consequence of this was that a considerable area of land was held and managed by the Government until custom owners could be ascertained or disputes between them resolved. Even where the custom owners could be ascertained and they had granted leases to the alien occupier, in some cases disputes subsequently arose regarding the status of the grantor as the true custom owner or representative of the custom owners, leading either to cautions being registered against the lease, or the forfeiture or surrender of the lease, or the intervention of the Minister of Lands. As a result the first decade of independence saw a rapid escalation of land title claims, some of which are still pending before the courts. Failure to clear this back-log and dissatisfaction about the lack of custom and customary law being considered in the process, led to reforms in the courts structure and procedure to deal with land issues. In 2001 the Lands Tribunal Act set up a new tier of courts to consider and rule on customary land claims. At present there is no appeal from the decisions of the highest Customary Land Tribunal to the ordinary courts. Moreover not all areas yet have customary tribunals and the efficiency of those that do exist has been questioned.¹⁵ In the meantime the Minister of Lands continues to manage and administer land subject to dispute. In particular the Minister has the power to lease land. The fact that he can give good title to a lease means that land developers far prefer to acquire land held under the Minister's powers than to go to the bother of trying to deal with custom owners. Ministers of Lands have therefore been key players in granting a large percentage of the total number of leases.¹⁶

The constitutional provisions put in place to provide for the transition from colony to republic remain in place and although probably intended to be used for a relatively short interim period, continue to be used, and to be used in circumstances for which they were probably not intended. The laws which give them practical effect are essentially based on introduced concepts, language and institutions relating to property, the successful transplant of which is at the very least questionable.¹⁷

¹⁴ Some land was also left abandoned or had never been developed despite being alienated.

¹⁵ See Republic of Vanuatu Department of Lands, 'Land Tribunal Progressive Report 2003', Ref No: LD:/AHKM/ahkm, 12 December 2003.

¹⁶ See S Farran, 'Ministerial Leases in Vanuatu: A Working Paper' (2002) 6 *Journal of South Pacific Law* <http://www.vanuatu.usp.ac.fj/jspl>.

¹⁷ See further S Farran, 'Land in Vanuatu: Moving Forwards, Looking Backwards' (2002) II *Revue Juridique Polynésienne* 213–24.

V. LAW RELATING TO LEASES

Leases of land are regulated by the Land Leases Act (Cap 163). The Act imports into Vanuatu law the paraphernalia and concepts of western land law. It establishes the administrative machinery for the recording, surveying and registration of leases and the creation of management posts such as the Director of Lands Records and Land Surveys to oversee this administration. No lease of longer than 75 years may be granted and those of three years or more have to be registered. These registers provide some factual evidence of the total area of land held under lease. For example, data collected in 2001 from the paper records filed in the Lands Registry Office in Port Vila indicated that there were around 1,070 registered leases for land in Efate, outside the municipal area of the capital of Vanuatu, Port Vila.¹⁸ Any figure obtained from the records is necessarily approximate owing to the back-log of leases waiting to be processed, missing leases, and some cases where there seems to be more than one lease for the same parcel of land. Moreover, formal leases which are registered represent only a fraction of land taken out of the hands of the original customary owners. Non-owners assert rights of occupation and cultivation through informal licences and the granting of privileges—sometimes in return for political support, and increasingly through squatting. There is also, no doubt, a number of unregistered leases of under three years' duration.

VI. STRATA TITLE

The sub-division of single plots by means of strata title was introduced under the Strata Title Act 2000. The purported aim of the legislation was to facilitate the sub-division of buildings into separate lots by registering a strata title plan. Certainly the language and detail of the legislation indicated that this was the purpose. Had the use of strata titles been so limited then it could have provided a useful means for small businesses to raise mortgage loan finance on the security of strata title held in commercial premises. However it is evident that the Act has been used for sub-division of undeveloped land and that this is in fact facilitated by amendments made to the original Act in 2003. As the Land Leases Act already provides for sub-division it is suspected that the Strata Title Act has been used because it lacks the safeguards for lessors—the custom owners—found in the former. Under the Strata Title Act, the lessee does not have to seek the consent of the lessor for sub-division but has to apply to the relevant authority—the municipal council or provincial government. Each lot under a strata title is

¹⁸ This was at December 2001. The municipal area was excluded from the research because of the very large number of sub-leases that occur.

issued with its own separate certificate of title, thereby removing the tie of a head-lease. Abuse of the Act is self-evident. The provisions require that any lease from which strata title is granted must have at least 75 years to run. This is the maximum period for all leases with the exception of renewable 75-year leases granted under the Land Leases (Amendment) Act 2003. These renewable leases are only possible over public land, which is overwhelmingly restricted to urban areas. Sub-divisions under strata title are however being advertised outside the municipal areas and in respect of rural land.

VII. THE VANUATU RESPONSE

Vanuatu is not oblivious to the problems of rapid land alienation. Land conferences have been held annually at the University of the South Pacific since 2002. During the course of 2006 a number of provincial meetings and consultations took place to consider land issues.¹⁹ These culminated in a National Land Summit in September 2006. The National Summit provided the forum for a wide expression of views, including those resulting from provincial-level consultations. The aim was to review issues of land management and development. In particular a need to address questions of land ownership, fair dealing, and the role of Government in the management and development of land were identified as key issues.

A. Questions of Ownership

It became evident from the Land Summit that this was an issue of considerable and continuing confusion 26 years after independence. Although the Constitution returned land to custom owners and stated that the rules of custom should form the basis of ownership, there were no clear guidelines on who the indigenous custom owners were and how they were to be ascertained, or what custom rules were to apply. There was also no consideration of what forms of proprietary interests were to be considered or how they should be ranked. Within the Constitution there is implied reference to both group rights and individual rights.²⁰ The problem was further compounded by the fact that in custom there was no 'owner', only a spokesperson or representative of a tribe, clan or family.²¹ At the same time there were, and

¹⁹ S Tahī, *National Land Summit, Final Report* (Government of Vanuatu, 2007) 15–19.

²⁰ See Art 73 compared with Art 79(2)(b).

²¹ The problem of language and legal concepts has been commented on elsewhere, see K Brown, 'The Language of Land: Look Before You Leap' (2000) 4 *Journal of South Pacific Law* <http://www.paclii.org/journals/fJSPL/vol04/>; and S Farran, 'The Language of Property Law and the Construction of Property Interests: Common Ground or Conflict' paper presented at the Australasian Law Teachers Conference, Canberra, Australia (July 2000).

continue to be, complicating factors such as temporal and spiritual rights, use and access rights, succession rights and suspended rights.²² There is also the difficulty of reducing oral custom to written rules and reducing the fluidity of a highly adaptable form of land tenure to writing. Customs are not codified, although there are collections of statements of custom for some islands. For example there is a statement of custom for Tanna, and more recently a statement of customary land law has been written by the Efate Council of Chiefs (Efate Vaturisu). This was published in February 2007 after the Land Summit, and perhaps marks the beginning of a wider movement to codify customary land law so that custom rules can emerge and be applied by the appropriate tribunals. However this process may well be resisted, as codification may make it much easier to amend or abolish such rules by legislation.

A further question of ownership which arose at the summit, and one that has been an issue for some time in Vanuatu, was the question of ownership of reefs and the sea. Unlike the situation in some Pacific island countries, the coastline does not vest in the state. Customary tenure deems custom land to extend to the reefs that fringe the islands. This is logical, as the reefs at low tide provide a rich harvest of marine resources and a place from which the spear fishermen can dive for larger fish. Legislation in the form of the Foreshore Development Act permits the development of the foreshore with the required consent of the Minister.²³ This Act, however, was a Joint Regulation prior to independence and therefore applied before all land was returned to custom ownership. As the foreshore has been held to be customary land for the purposes of the Act,²⁴ and as the Constitution provides that

the rules of custom shall form the basis of ownership and use of land in the republic of Vanuatu (Article 74),

it appears that there is an incompatibility between the powers conferred on the Minister under the Foreshore Development Act and these constitutional provisions, because permitted development may take the beneficial ownership of foreshore land out of the hands of custom owners. By virtue of Article 95 of the Constitution, this pre-independence legislation must be construed

with such adaptations as may be necessary to bring them into conformity with the Constitution.

²² Where for example, there is no eldest son, so patrilineal land must temporarily pass matrilineally.

²³ Foreshore Development Act—Joint Regulation No 31 prior to independence (now Cap 90)—s 2 states: 'No person shall undertake or cause or permit to be undertaken any development on the foreshore of the coast of any island in Vanuatu without having first obtained the written consent of the Minister to such development'. Development is defined in s 1 as: 'the carrying out of any building, engineering, mining or other operations in, on, over or under the land, or the making of any material change in the use of buildings or other land whether or not such land is covered by water'.

²⁴ *Brown v Bastien* [2002] VUSC 2.

To do this it would probably be correct to say that no development of the foreshore can take place where that affects customary land. The lease boundary of any coastal lease should therefore only extend to the high water mark. Despite this, however, the National Land Summit heard many examples of beaches, rivers, lakes and other recreational sites being fenced off by individuals, especially foreigners, and public and customary access denied. Among the resolutions of the Summit—see below—were a number relating to coastal areas, in particular the need for public access to the sea, rivers and lakes, the recognition and safeguarding of public and custom owner rights to areas above the high water mark and to the reef, as well as concerns about the environmental protection of rivers and beaches.

B. Fair Dealing

The report of the 2006 National Land Summit identified a number of concerns with land dealings. In principle land held under customary land tenure can only be dealt with in two ways: either in custom or by lease. In practice there may be some overlap. First, customary owners may negotiate what either appear to be or are understood as leases over their land with other indigenous occupants but these arrangements turn out to fall short of a lease. Alternatively customary owners may think that they are agreeing to various rights and privileges recognised in custom, such as the right to access the beach or the right to take sand or timber, but find that they have entered into leases of some kind. Sometimes there are genuine misunderstandings between parties; at other times there is duplicity or fraud.

Where custom is used as the basis for land dealing it may be unclear what customary rules are to be applied or indeed what these are. Custom is flexible and subject to manipulative interpretation. Customary transactions are also not required to be registered. They are therefore potentially uncertain and insecure. There is also some uncertainty whether a non-ni-Vanuatu can enter into any transaction governed by custom—for example, banks being approached for loans secured against customary land.

Predominantly therefore land alienation takes place by way of leases. Lease transactions confront custom owners with a range of alien concepts which are not always easily understood and which can leave customary owners vulnerable. Issues identified at the Land Summit included ignorance about the market value of land (compared to its customary value) especially in advance of considering whether to lease it; lack of understanding about the nature of a lease; lack of any regulation of estate agents and middle men—usually ex-patriates—operating in Vanuatu; unfair and undervalued rentals and premiums which custom owners have insufficient participation in negotiating; and failure of representatives of groups to take into account the interests of the whole group in making land management decisions.

Similarly, concerns were expressed about lack of accountability when the Minister exercised his powers to manage lands over which there was a dispute.

The Constitution states that

land transactions between an indigenous citizen and either a non-indigenous citizen or a non-citizen shall only be permitted with the consent of the Government. [This] ... shall be given unless the transaction is prejudicial to the interests of—

- (a) the custom owner or owners of the land;
- (b) the indigenous citizen where he is not the custom owner;
- (c) the community in whose locality the land is situated; or
- (d) the Republic of Vanuatu.²⁵

Arguably these considerations should apply whether the Minister is managing land under dispute, or state/public land. However, it is unclear if, and to what extent, the above provisions empower government to act independently. If they do, then returning land to custom owners may have been meaningless in the current climate of land alienation. If they do not, then any decisions of government which involve land management should be assessed against the above conditions.

C. Sustainable Development

Sustainable development is not a new concept to customary land-owners, although the contemporary phrasing of it may be unfamiliar. Customary traditions of cultivation, harvesting, land and marine resource-use have been in place for centuries. However there is a difference between the use of resources for subsistence economies and the exploitation of these for cash. Rapid land clearance, sand, coral and gravel mining, road construction and building construction all have a grave impact on sustainability, as does increased cultivation, especially in water catchment areas or coastal zones. Often customary land-owners are not aware of the long-term impact of these changed usages. Developers are keen to play down any adverse environmental impact and although there are requirements for environmental impact statements to be presented prior to development, the policing and enforcement of these appears to be weak and often the environmental damage is taking place away from the actual development, for example where sand is being bulldozed out of beaches or coral being mined from hills. Population increase and urban drift is leading to native bush land being cleared for gardening—often by squatters—and as coastal areas become more developed this process is moving inland. Vanuatu also lacks any effective or co-ordinated zoning plan. Although registered leases must indicate

²⁵ Art 79.

an approved use, often this is changed or abused. For example, the limited construction of buildings allowed on agricultural leasehold may be ignored and extra buildings constructed. Density of building on residential plots may be uncontrolled and little attention given to the longer-term effect of land drainage, or land infill, or the efficiency of raw sewage treatment or storm drainage systems.

There is also virtually no awareness of the social impact of taking customary land out of customary hands, or how development is affecting people both within its immediate vicinity and further afield. One of the impacts which has been poorly studied is that of depriving people of coastal access. Others are the impact—both positive and negative—of improved infrastructure. For example, in 2006 the Republic of Vanuatu and the United States of America agreed that one of the projects of the Millennium Challenge Corporation would be to develop the transport infrastructure of Vanuatu. An aid fund of US\$65,690,000 was set aside for this purpose. The aim is to ‘reduce poverty and increase incomes in rural areas by stimulating economic activity in the tourism and agricultural sectors’.²⁶ In Efate this means improvement to the round island road, which is only tar-sealed for a very short distance near Port Vila, and in places is sometimes impassable due to rainwater erosion. Islanders from the north of the island wishing to bring produce to the Port Vila market have to hire taxi trucks and buses. This road will make their journey easier, although whether the Port Vila market can absorb a great increase in produce may be more questionable. There is, however no evidence of social impact assessments having been made on the villages through which this much faster road will pass, whether easier access by tourists to the North of the island is being encouraged with sustainability in mind, or whether the new road will simply facilitate and accelerate the alienation of the entire perimeter of coastal land in Efate.

D. Land Summit Resolutions

The National Land Summit arrived at a list of 20 resolutions. In summary these were:

- the law should recognise and give effect to communal ownership of land;
- the central and provincial governments and the National Council of Chiefs should work together to document the custom (*kastom*) that determine ownership, land policies, boundaries and land dealings;

²⁶ *Vanuatu Daily Post*, 7 July 2007.

- greater awareness of the existing (plural) legal and economic framework should be undertaken;
- the current law of leases should be reviewed;
- lease agreements should be made comprehensible and inclusive in their negotiation and agreement;
- certificates of negotiation should be subject to increased scrutiny and publicity, especially at the local level;
- the Minister should cease to have the power to approve leases over disputed land;
- abuses of the use of strata title should cease and land owners should be involved in their approval;
- real estate agents should be regulated;
- lease rental and premium rating should be reviewed and reformed;
- should be put in place and effectively enforced;
- physical planning and zoning laws should be strengthened and a subdivisions policy adopted at national and provincial level, and
- efforts should be made at all levels and to all sectors of the community to raise awareness of sustainability issues.

Given that over 1,000 proposals were made, to reduce these to 20 resolutions was quite a feat. It is still, however, an ambitious list. What is not clear yet is how greater awareness of customary land tenure (Land Ownership) will inform and improve dealings in land especially under leases (Fair Dealings) or how regulation will accommodate custom.²⁷ Much also depends on the support and drive of central government as well as co-operation between provincial governments—some of whom currently benefit considerably from development and some of whom derive very little benefit and would probably like more development.

The 20 resolutions of the National Land Summit were included in a document: 'Interim Transitional Strategy and Future Plans to Implement the Resolutions of the National Land Summit 2006' and endorsed by the Council of Ministers.²⁸ An interim strategy was approved. This was to endorse the resolutions of the National Land Summit (which had been modified slightly by the Council);²⁹ to endorse an interim transitional strategy and the appointment of a Steering Committee; and an indication of

²⁷ On the integration of custom and informal economies into legal systems and formal economies see H de Soto, *The Other Path: The Invisible Revolution in the Third World* (New York; London, Harper & Row, 1989) but also the failure of the Land Groups Incorporation Act 1974 in Papua New Guinea: L Kalinoe, 'Incorporated Land Groups in Papua New Guinea' (2003) *Melanesian Law Journal* 4.

²⁸ Decisions 138/2006: Outcome of the National Land Summit and the Interim Transitional Strategy, 21 November 2006.

²⁹ The original resolutions were written in Bislama—the *lingua franca* of the country. These differ slightly from those published in the Final Report written in English.

government commitment to seek support and funding for implementation of the resolutions (ie seek external aid funding).

Following the Summit the proposed Steering Committee was established;³⁰ funding was secured and—as is often the case with any matter requiring reform in the region—a call for a review team to consider how to implement the resolutions, was put out to tender. After two visits to Vanuatu in early 2007,³¹ the selected review team (an Australian-based consortium) published its report in March 2007. This indicated that:

[t]o remedy the problems raised at the Land Summit, policies need to be clarified, new legislation introduced, and some existing legislation amended. What is required is not a sweeping revolution, but a reinstatement of sound land tenure and land use principles, as well as fairness and social equity. There is also a pressing need for strengthening the land administration and land use management arrangements. Partly this can be done by institutional reform, partly by better co-ordination, partly by training and capacity-building. Decentralisation is also important, but in order to be effective it must be accompanied by organisation and management reforms.³²

Key weaknesses were lack of a national land policy, the system of land administration and the current legal framework.

E. Land Policy

The very clear policy at independence was to return land to custom owners and to thereby reduce the amount of land held by foreign settlers, including absentee owners.³³ At the same time, however, the new state had to develop its economy and attract investors, especially as pre-independence turmoil had driven away a number of these. What was not clear, however, was the intended or anticipated relationship between central government and custom owners. The latter were given the freedom to deal with their own land as they wished while the former was responsible for ensuring

³⁰ The Steering Committee members consisted of the Director-General of Lands, the Director-General of Trade, the Director-General of Finance, the Director-General of Agriculture, Forestry and Fisheries, a representative from the State Law Office, the Secretary General of the Council of Chiefs, a delegate from the Vanuatu Cultural Centre, the Chief Executive Officer of the Vanuatu National Council for Women, a representative from Women's Affairs, a representative for youth from Wan Smol Bag theatre group, a representative from the private (estate agents and developers') sector, and the Secretary to the Committee, Ausaid has observer status.

³¹ A total of three weeks.

³² *Vanuatu: Review of National Land Legislation, Policy and Land Administrations* (March 2007) p ii.

³³ This represented about 20% of all rural land. Other land was public land, mostly in urban areas and used for public purposes, and urban land, located in Port Vila and Luganville, which was originally to be under the administration of the Urban Land Corporations of those two towns.

that land transactions prejudicial to custom owners, the national interest or local communities would be prevented. The Constitution envisaged that a national land law would be put in place after consultation with the Council of Chiefs.³⁴ In fact this never happened. Clearly Vanuatu needs a new land policy, and it needs a national policy which will override or inform the policy and decisions of people at a local level but which is supported by such people.

What the Review Report does not address is whether the government of Vanuatu is in a position to formulate a national policy on land when it is pressured from within and without to 'develop' and maintain economic growth. In an IMF publication entitled 'Doing Business in 2007' the delay and cost of registering land in Vanuatu was criticised—presumably because it delays the setting up of business ventures—often by ex-patriates.³⁵ In an AusAid funded report on the South Pacific region, entitled 'Pacific 2020', problems of customary land tenure were highlighted as being an obstacle to economic development in the region.³⁶ In a paper published in 2006 Claire Slatter highlighted the difficulties Pacific islands face if they impose too many restrictions or conditions on tourism development, because of the commitments under the WTO General Agreement on Trade in Services not to introduce unnecessary barriers to trade.³⁷ This therefore makes it difficult to insist that beach resorts catering for tourists permit local people to freely exercise customary rights over the beach, or that the benefits of tour operators are shared with local communities. She points out that the likelihood of Vanuatu retaining its own policy space is becoming increasingly constrained by the conditions of trade agreements such as European Economic Partnership Agreements, accession to the WTO (for which Vanuatu has recently recommenced negotiations) and commitment to PACER,³⁸ the proposed free trade zone linking Pacific island countries with their larger neighbours.

Elsewhere, where land is at a premium, a range of policies has been adopted to restrict land alienation. These include moratoriums on all development—as has occurred in coastal parts of Spain; strict requirements of residence, nationality and investment before a person can acquire a home in a particular location—as in the Channel Islands; repatriation and redistribution of land by government decree—as has happened in parts of East Africa; or state control of all land transactions—as is happening in parts of

³⁴ Art 76.

³⁵ IMF Country Report 07/93.

³⁶ Pacific Islands 2020 Report by AusAid <http://www.ausaid.gov.au/publications/pdf/pacific2020.pdf> (3 March 2008).

³⁷ C Slater, 'The Con/Dominium of Vanuatu? Paying the Price of Investment and Land Liberalisation—a case study of Vanuatu's Tourism Industry', *Vanuatu Daily Post*, 19 August 2006.

³⁸ Pacific Agreement on Closer Economic Relations.

South Africa where land must be sold to the state rather than private purchasers. While not all of these policies may seem attractive or even feasible in the context of Vanuatu, what should be clear to the Review Team or any other body making recommendations for reform is that the formulation of the policy is the first and essential step.

F. Legislation

Although there has been a considerable body of legislation passed since independence relating to land—including law to create freehold titles of urban land³⁹—the basic legislative framework which remains in place was one to facilitate the changed status of land holding at independence.⁴⁰ While the Land Summit identified defects in the existing legislation, many of the safeguards that are there are simply not enforced. The complexity of legislation such as the Land Leases Act does not lend itself to easy comprehension and in any case the concepts on which it is based are foreign to customary tenure. Often customary owners who have granted leases fail to appreciate that they have lost all rights to their land for a period of 75 years, or that registration of leasehold title is generally indefeasible, or that rights of way or profits should be secured by registration if they are to bind subsequent successors in title—especially where there is subsequent multiple sub-division of a plot. There are provisions in the existing laws which could be used more effectively. For example, there is provision for forfeiture of leases, for the imposition of conditions as to use of land, for review of rentals and for compulsory acquisition of land for the public benefit.

At the same time it is clear that provisions which were made for a period of transition and therefore intended to be interim ones have remained unaltered and in many instances been used for purposes for which they were not intended. Two important examples suffice. First, the power of the Minister to manage lands where custom owners could not be ascertained or where there was a dispute as to who these were, was intended to be a power exercised over alienated land. It was necessary as an interim measure to ensure that those to whom land had been alienated and who were still in possession of the land could, if they so wished, lease the land and keep it in production. Ministerial power, however, has continued to be exercised not only over land which was originally alienated but over other, non-alienated land as well. Secondly, again as part of the transitional process,

³⁹ Freehold Titles Act 1994, which has never been used.

⁴⁰ Post-independence legislation includes: Lands Acquisition Act 1992 (which has never been used); Urban Lands Act 1993 (repealed in 2003); Freehold Titles Act 1994; Land Referee Act 1983 (repealed in 2002); Valuation of Land Act 2002; Land Valuers Registration Act 2002; Environmental Management and Conservation Act 2002 and Forestry Act 2001.

under the Alienated Land Act 1982 any person claiming to be an alienator had to apply to be registered as such. If the custom owners were willing to negotiate with settlers on their land, then the Minister issued a Certificate of Registered Negotiator. If the custom owners did not wish to negotiate a lease, the land had to be vacated. This procedure is still being used today to negotiate leases over customary land which has never been alienated to colonial settlers.⁴¹

Legislation put in place to control and manage development and land use, to protect the environment and ensure sustainability has simply been ignored or by-passed in many instances or found to be unworkable either because of poor drafting or because of weak enforcement. For example the Physical Planning Act 1986 potentially provides a means of zoning through the declaration of Physical Planning Areas. However, not only does responsibility fall under the Minister of Internal Affairs—rather than that of land—but the legislation does not impose land use restrictions, breach of which would be an offence. Instead non-compliance with the Act requires the serving of an enforcement notice within a limited time period with the right of appeal to a Magistrates' Court. There is no penalty for non-compliance with a discontinuation notice. Similarly weak enforcement is found in the Foreshore Development Act 1975, where non-compliance is subject to the paltry fine of Vt 200,000 (approximately £1,000), which is easily affordable by overseas developers. In the case of the Environmental Management and Conservation Act 2002 there is no right of enforcement officers to enter land, with the consequence that officers trying to enforce environmental protection measures have found themselves involved as defendants in civil litigation, and been held personally liable when they have expressed an opinion on the undesirability of certain developments.⁴²

G. Land Administration

The early land legislation established an administrative machinery to give effect to the law. The efficiency of this has depended very much on individual office-holders, the resources allocated to Departments under national governments and the facilities provided to support the work required. There has been confusion for a number of years over the respective responsibilities of the various office-holders and also on the division of tasks between central and provincial government, especially in determining and controlling land use, planning and zoning. It has also not been clear whether the administration of land is to be carried out in the interests of

⁴¹ For an example of the abuse of these two provisions see *Ifira Trustees Ltd v Family Kalsakau* [2006] VUCA 23.

⁴² See *Kakula Island Resorts Ltd v Government of the Republic of Vanuatu* [2006] VUSC 3.

custom owners, the developers, the individual minister or the government of the day. Often these various stakeholders have competing and conflicting interests.⁴³ While the division of roles and tasks across different departments prevents the vesting of power, and potentially the abuse of that, in the hands of a single unit, it can also result in overlap or lacunae.

A more fundamental problem is the underlying weakness of public administration and the challenges of enhancing private sector economic development in the face of public sector inefficiency. Despite a huge injection of cash from the Asian Development Bank to fund a Comprehensive Reform Programme, which started in 1997, it is clear that there is still considerable need to improve the quality and delivery of government services.⁴⁴ Many of the posts which have been created to support land management are unfilled. Often senior posts are subject to political influence, or competent members of staff are relocated to other departments. The Department of Lands, Survey and Records within the Ministry of Lands and Natural Resources has key responsibility for the administration of land management in Vanuatu and also represents the interface between customary land owners, developers and the government. Within it, however, are a number of different units not all of which operate with the same level of efficiency. There is also the problem that most of these services are located in Port Vila, with very little decentralisation to provincial government. However, decentralisation, although in line with greater local input into land development, could aggravate the weaknesses of the current system.

The Review Team suggested that the weaknesses of the current administration of land management need to be addressed by a study of the organisation, management and operations to review structures, roles and responsibilities. It identified as necessary: staff training; recruitment and retention; clarification of role responsibilities; and increased monitoring.

Capacity building, good governance in the public sector and institutional strengthening are the frequently stated mantra of aid-funded projects. This is understandable in so far as these themes lend themselves to projects with clear objectives, which can be managed within a stipulated time frame and the cost of which can be relatively easily assessed. However, what is not addressed but which might be fundamental to poor delivery of public services, is the local approach to public service. Pacific island countries inherited the legacy of colonial administrations. In Vanuatu in fact there were two colonial administrations, French and British, which operated

⁴³ See eg D Paterson, '*Ifira Trustees Ltd v Family Kalsakau* [2006] VUCA 23; *Vanuatu Copra and Cocoa Exporters Ltd v Maison De Vanuatu* [2007] VUCA 24: Two instructive cases for ministers of government, their political advisers, and public servants' (2008) 12 *Journal of South Pacific Law* 128–37.

⁴⁴ See report by the Ministry of Finance and Economic Management, entitled 'Priorities and Action Agenda 2006–2015 (June 2006) p 3 and concerns expressed in the final Report of the National Land Summit.

separately and with very different public sector civil service philosophies. At independence it appears to have been assumed that these models would continue to work and were compatible not only with the new status of the nation but also with Pacific values. The post-independence experience raises questions about these assumptions. Certainly in many Pacific island countries the public sector is a significant employer. With limited private sector development the state is an important source of income and there are many related benefits to be derived from state employment, for example housing, pension schemes and health care. Despite this there is little sense of ownership of central government services, and consequently there is little sense of accountability by employees.⁴⁵ However, corruption in the public sector is endemic, ranging from the misuse of government vehicles and telephones to nepotism. Indeed, the Vanuatu Ombudsman has published a number of reports on breach of the Leadership Code and misuse of public office.⁴⁶ Such publications cause a ripple but no long-term impact and prosecutions rarely, if ever, follow.

Although a number of the resolutions of the Land Summit indicate that the appropriate response lies in improved public administration, in many ways this is at odds with resolutions advocating more involvement by customary land owning groups, a greater role for chiefs, and non-governmental agencies such as the Vanuatu Cultural Centre. The proposed administrative reform is indicated as a 'short-term' initiative by the Review Team, to be accomplished in a period of three to 12 months. This may be optimistic.

VIII. THE 2007 PICTURE

In 2007 I was unable to update my statistical data regarding the number of leases registered in the period 2000–07 because the Lands Records Department had been relocated and the hard copy records were still in the packing cases waiting to be transferred to a sophisticated electronic data base, which unfortunately was found to be unable to cope with the plot maps.⁴⁷ Information had to be obtained in other ways. The latest survey map of Efate indicated that many more leasehold plots had been marked out. It was also evident that many of the original larger leaseholds had been subject to sub-division and were being advertised and developed. Revenue figures from the Land Leases Records Office indicate that lease

⁴⁵ An example can be found in the *Kakula* case where the government parties (defendants) failed to file a defence, to cross-examine the claimant witnesses or pay trial fees as required.

⁴⁶ Established under the Leadership Code Act 1998 amended in 1999. The reports of the Ombudsman can be found on PacLII <http://www.paclii.org>.

⁴⁷ Part of an aid-funded digitisation project.

transactions generated considerable income for government in 2006.⁴⁸ There was considerable visual evidence of land clearance, and in some cases indigenous bush had completely disappeared. Beaches which had formerly been open to the public were fenced off, and several had been privatised and incorporated into tourist developments. In some places local people were now being charged a fee if they wished to access the beach. Beach excavation and construction was also evident, with natural sea pools being blasted out of coral coast land, thereby changing the natural wall of sea defences and contributing to silting elsewhere. Around the capital there were several large building supply depots with piles of sand, crushed coral and hardwood timber ready for use. The local paper carried reports of illegal logging taking place on land controlled by the Minister of Lands in a location where a land management area had been established at the request of the island's Council of Chiefs and the provincial government. On prime sites large villas were being constructed, many with high walls topped with razor wire, electric gates and security lighting. In some developments barriers had been erected across roads and access controlled by security staff. More positively, small building and service firms were springing up and more material wealth was evident in the amount of road traffic congesting the capital. On the other hand I heard stories of violence and civil unrest in the peri-urban areas, inter-island land disputes, especially among squatters, and a sense of pessimism among young, unemployed urban dwellers matched by the increasingly hard-line views by traditionalists, including restricting freedom of movement from rural areas to urban areas, sending young people back to the rural areas and giving chiefs more powers to punish those guilty of anti-social behaviour.

IX. THE OUTLOOK

The population of Vanuatu is not huge by international standards. In 2007 it was estimated to be around 212,000, with a growth rate of 1.46 per cent. Thirty two per cent of the population is under the age of 14.⁴⁹ Employment opportunities are limited and outward migration almost zero. Vanuatu, unlike some other Pacific island countries, lacks outward migration links to Australia, New Zealand or the United States of America.⁵⁰ Ni-Vanuatu have nowhere to go. Increasingly they drift to the urban centres. Many young people are now second or third generation urban dwellers. They have no

⁴⁸ There were 1,155 leases transferred and 817 new leases granted, generating Vt 153,819,123 (approx £7,690,956).

⁴⁹ CIA World Factbook: Vanuatu <https://www.cia.gov/library/publications/the-world-factbook/geos/nh.html#People> (10 March 2008).

⁵⁰ Cf for example, the relation of Cook Islands and Niue with New Zealand; Marshall Islands and the Federated States of Micronesia with the United States of America.

inclination to return to their island roots. Urban poverty and urban crime is on the increase. Property crime is common. Recently the editor of one of the local newspapers suggested that given the ineffective police service, ex-patriates should form vigilante patrols, road blocks should be set up on roads leading to areas where ex-patriates live, and ex-patriates should arm themselves to deal with intruders and trouble-makers.⁵¹ This suggests little confidence in the strengthening of law and order services, which has been ongoing for many years with the assistance of aid funding. Indeed, the Australian Federal Police have a permanent presence in the Australian High Commission, which is housed in new premises on land leased from the government, in a building which resembles a high-security jail.⁵²

2008 is envisaged by the Lands Steering Committee as the year in which there will be increasing public awareness of the land issues highlighted at the 2006 summit, leading to a new Land Law Act in 2009. A number of projects are underway. Immediately following the Summit a moratorium was imposed on the granting of new sub-divisions and the surrendering of agricultural leases. Detailed draft laws have been formulated to govern land use, as have guidelines for land sub-division. Fieldwork has been started to establish customary boundaries and case studies have been undertaken to establish a factual understanding of customary tenure at ground level.⁵³ Funding has been secured from New Zealand to foster public awareness, to review and strengthen the Customary Land Tribunals and to improve the recording of land leases and to digitalise the records. Australian financial assistance has been promised for undertaking a land lease audit and for reforming the Strata Titles Act 2000. Some proposals have failed. For example the resolution that the powers of the Minister for Lands to manage contested land be curtailed required the Minister himself to introduce the proposal in Parliament. As the Lands Ministers in Vanuatu have a fairly well-established track record on taking advantage of this power—as evidenced by Ombudsmen reports—this never happened. Indeed there has been very little legislative activity. Although an amended Land Lease Act came into effect in 2007 these amendments had in fact been passed in 2004. To date nothing appears to have been done about the Strata Title Act, or to regulate estate agents and developers operating in Vanuatu or to clarify foreshore rights. There is no record of any leases being forfeited because they have not complied with conditions or because the land use is damaging to the public interest.

⁵¹ Marc Neil Jones, 'Crime is Out of Control—It is time to Stop the Talk and Act', *Vanuatu Daily Post*, 12 January 2008.

⁵² I interviewed one of my sources within the building, under the scrutiny of surveillance cameras.

⁵³ These have been undertaken in Mele and Ifira. The former lies outside the Port Vila municipal area, the latter largely within it.

Recently the government in Vanuatu has changed and so a new Minister of Lands is in place. While the Director-Generals are not direct political appointees and so can survive changes in government, they are not immune to these. There is a danger therefore that some of the impetus of the National Land Summit and its resolution will be lost. In the meantime there is real concern among local people, especially those who are not benefiting from the economic profits of land alienation, or who have made short-term gains but see longer-term misery ahead.

X. CONCLUSION

This case-study, while particular to a certain time and place, is also illustrative of a phenomena occurring in other places. It is hoped that presentation of this research will prompt consideration of comparative studies elsewhere and an opportunity to reflect on the policies which informed land law reforms in the United Kingdom and other common law countries from the early twentieth century, as well as to critically consider the human and social dimension of land commoditisation when this is transplanted in foreign soil. On islands, in particular, land is not limitless. Yet in many countries with undeveloped economies, the majority of the population remains dependent on the land for subsistence, and may have nowhere else to go. There are difficult dilemmas. When I presented this paper at the Modern Studies in Property Law Conference in April 2008, I used an illustration drawn by a Vanuatu teenager. The heading was 'Decisions have Consequences'. It depicted a sad ni-Vanuatu with many children and a contented Australian standing behind a barbed wire fence from which hung the advertisement for sub-divisions of land. The narrative was as follows:

In January 2006 James sold his land to an Australian. The Australian subdivided the land he bought from James and sold it for ten times the price per plot that he had given James (for the whole plot). He was very rich indeed. Nine years later James's children and grandchildren have nowhere to build a house.

I was asked, 'Why did James sell the land?' The answer is not profound. He wanted the money. He needed money for shoes, for school fees and health care,⁵⁴ for transport and increasingly, especially in urban areas, for food. Perhaps at the time he had other land he could live on, or relatives who were willing to accommodate him on their land. Perhaps he had fewer children, better health, a job. Perhaps he bought a taxi bus with the money or hoped to start a small business, little realising that there is a glut of taxi-buses and small shops all selling identical imported Chinese goods. In the shift from subsistence economies to monetary ones, people want money. Moreover, if

⁵⁴ Neither of these are free in Vanuatu.

it was James's land, why should he not exercise his autonomy as an owner to make, what turned out in the long run, to be an unwise decision? The illustration, however, poses many wider questions. Should those who can afford to take advantage of the legal framework that facilitates alienation refrain from doing so? Should those who benefit from the short-term gain of that alienation be counselled not to alienate their land? Should the international community have an obligation not to exhort underdeveloped countries to 'make the most of their natural resources'? Is buying second homes in small islands a 'crime against humanity'? Indeed, should potential buyers be counselled not to buy land? Should selling the land stop? These are difficult questions and there are no easy answers. Western perceptions of land are often very different from those of indigenous people. The language and concepts used to describe the relationship of people with land are not the same. Along with colonialism went legal imperialism. While the former may have all but disappeared, the latter has not. There continue to be initiatives to, for example, introduce the Torrens system into South Pacific island countries and to establish ownership by way of cadastral survey and registration. The recommendations of the Review Team being deployed in Vanuatu illustrate a range of these ethno-centric approaches. Focus on process, mechanics and procedure fails to take into account differences of underlying philosophy informing the relationship of people with land. The rhetoric of owner-occupation, mortgage finance and the economic advantages of privatisation of land has been so long with us that perhaps it is time to pause and consider the ethical dimensions of that perspective, especially when we are tempted to acquire second homes in countries where we, and our ideas, may be foreign.

PART THREE

USING LAND, USING LAW: CHANGE AND TRADITION

7. Law, land, development and narrative: a case-study from the South Pacific', (2010) 6 *International Journal of Law in Context* 1-21

8. „Navigating Changing Land Use in Vanuatu', (2011) 33 (2/3) *Pacific Studies* 250-268

Introduction

The publications in this concluding part of the collection pick up a number of earlier themes such as the impact of colonial administration, the legacy of land alienation, the plurality of laws, systems and structures that prevail and the tensions between using land for development and retaining it for inter-generational security. This is justified not only because each publication was directed at a different readership but also because present litigation, or a snapshot of a land register, is a moment in a much longer continuum of events. The land dispute which reaches the court is unlikely to be due solely to a contemporary event although proceeding to litigation may be triggered by this (for example, an agreement to lease, the grant of a negotiating certificate, or the receipt of a lease premium). At the same time, however, the aim of these two publications was to present the armoury of the law as a possible positive force for change which indigenous ni-Vanuatu could commandeer for their own ends.

The preceding part has suggested disempowerment of indigenous people and their laws. This part, which consists of two published articles, focusses on how local people are taking ownership of legal change and legal tools and using them for their own ends. While not losing sight of the importance of custom and customary law which has been highlighted in the preceding parts, it is important to note that custom often survives because it is adaptable, flexible and accommodating. Custom,

however, does not exist independently of those who practice and observe it. The two publications in this part examine how human agency intervenes to make laws „fit for purpose’, especially in an environment in which people are using their land in new ways or adopting new forms of land governance. One of the significant aspects of the research evidenced in these two articles is that unlike the situation confronting aboriginals in Australia, for example,¹ land claimants do not have to demonstrate that custom is „frozen in time’ but rather that traditions of change which are integral to custom can be used to justify contemporary adaptations.² In this way these too can become part of custom, creating perhaps new forms of legal pluralism adapted to twenty-first century challenges.

The first publication (Publication 7) explores this adaptive approach through case law, looking in particular at the narratives brought into court to support land claims. The term „narrative’ was used deliberately to convey the continuing importance of oral tradition in Vanuatu and to capture the fluid and accumulative possibilities of such narratives especially when they are being delivered in a legal context. The importance of oral tradition as cultural heritage is widely recognised in the Pacific and elsewhere, but as a reliable source of historical events it has often been challenged, not least because oral history, while it may provide evidence in lieu of documentary evidence or fill gaps in the latter, is also susceptible to „the blending of incident and interpretation’³ and can present verification challenges. While the Common Law incorporates elements of „story-telling’ as a tool of litigation (especially in jury trials),⁴ there is concern that each time the narrative is expressed it

¹ See S. Clarkson, „Yorta Yorta: the effect of changes in traditional laws and customs in native title determinations’ (2000-2001) 21 *U. Queensland L.J.* 235-239.

² A common example in the Pacific is the integration of Christian mores into custom and tradition.

³ J. Burrows, „Listening for a Change: the Courts and Oral Tradition’ (2001) 39(1) *Osgoode Hall Law Journal* 1-38, 5. See also *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria and Others* BC9806799, Federal Court of Australia. 18 December 1998 per Olney J at para 24, who refers to '[t]he difficulties inherent in proving facts in relation to a time when for the most part, the only record of events is oral tradition.

⁴ L. Kadoch, „Seduced by Narrative: Persuasion in the court room (2000-2001) 49 *Drake Law Journal* 71-124.

not only changes the previous narrative, but itself becomes already part of the past.⁵ Consequently in formal court systems based on the Common Law, rules of hearsay exclude most of the evidence that might be included in oral narratives. Arguably these concerns may reflect western-centric views and may be seen as less of a problem where the past is the lived present; where the blending of incident and interpretation is accepted as integral to the story-telling; and where the strict rules on admissibility of evidence are either modified or ignored, as is the case with the courts in which the cases which are considered in this publication, are heard.

The admissibility of oral evidence is also an acknowledgment of autochthonic sovereignty in so far as „Such narratives enable indigenous systems of thought and identity that have been damaged or denigrated by colonialism to be recuperated and affirmed as authentic’.⁶ Recognition of the role of narrative and the relevance of oral histories is in a way, therefore, a counterbalance to past colonialism and present neo-colonialism. At the same time however, narrative in the legal setting is not solely about reclaiming or recuperating an indigenous identity. The process and adaptation also influences future identity (for example, by presenting simplified lineage claims, using documentary evidence to support oral claims, or by presenting evidence through language translation). In some ways this process of re-shaping is consistent with traditional notions that ni-Vanuatu are „people of place’,⁷ because place (the land) is itself being changed through new or different forms of use, rights and association. In this way the law report becomes itself evidence of custom and a lens on the colonial and more recent past.

The aim of Publication 7, was not only to arrive at a better understanding of patterns of customary land tenure through the use of legal tools, but also to demonstrate that indigenous litigants were in many respects taking „ownership’ of the process of litigation and not merely passive receptors of imposed and introduced laws and

⁵ A. Stratton, „Courtroom Narrative and Findings of Fact: Reconstructing the Past One (Cinder) Block at a Time’ (2003-2004) 22 *QLR* 923-924.

⁶ P. Lenta, „The *Tikoloshe* and the Reasonable Man: Transgressing South African Legal Fictions’ (2004) 16 *Law & Literature* 353, 356.

⁷ J. Simo, states for example, „Melanesians entire lives are grounded in their land’, „Land and the traditional economy: “Your money, my life” Hu I kakae long basket blong laef” in Anderson, T., and Lee, G., (2020) *In Defence of Melanesian Customary Land*, AID/WATCH, 40-44, 41.

processes. In this context transfer and transformation can be seen as acting together as an expression of a new legal hybridity which sits somewhere between customary and introduced legal systems and is illustrative of the articulation of a form of sovereign autonomy.

This theme is continued in the second publication, (Publication 8) which completes the collection. Originally given as a conference paper, this article draws on field studies undertaken by members of the World Bank project J4P, (Jastis Blong Evriwan) based in Vanuatu and to which I have referred in the Introduction to this collection. The significance of the project was the data that emerged as a result of extensive statistical analysis and located case studies, which together provided considerable insight into contemporary land use which could be used to inform future policies and law reform under the national Land Sector Framework 2009-18.

This publication reflects the research challenges which confronted the project and which are themselves symptomatic of some of the problems which developing countries encounter, such as uncoordinated or unsustainable aid-funded interventions and shortfalls in human and physical resources. Nevertheless the two island case studies provided me with valuable insight into land tenure in transition and examples of adoption (for example, the land trust), and adaption (for example, using lease registration to secure customary land rights). Evidence of a growing awareness of non-customary land laws and of customary land owners taking advantage of these laws to achieve land security for themselves was also grounds for modest optimism for the future.

Publication 7

Law, land, development and narrative: a case-study from the South Pacific', (2010) 6 *International Journal of Law in Context* 1-21

International Journal of Law in Context

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Law, land, development and narrative: a case-study from the South Pacific

Sue Farran

Subject: Real property. **Other related subjects:** Human rights. Legal systems

Keywords: Case law; Customary rights in land; Indigenous peoples; Land tenure; Legal systems; Vanuatu

**Int. J.L.C. 1* Abstract

This article explores a primary source of legal studies, case-law, as a form of narrative in the context of indigenous land rights, and considers how this narrative negotiates pre-colonial land claims in a post-colonial context. Its case-study is the South Pacific island country of Vanuatu, a small-island, least-developed, nation-state, where laws introduced under Anglo-French colonial administration are still retained and sit uneasily alongside the customary forms of land tenure which govern ninety percent of all land in the islands. The article looks at the traditional and changing role of narrative presented as evidence by claimants and their witnesses against a context of rapid social and economic change, and asks whether the metamorphosis of narrative signals the future survival or imminent demise of customary indigenous land rights and what that might mean for these island people faced by the pressures of development.

Introduction

The role of indigene as narrator or the central figure of narrative, while not commonplace, is not unfamiliar in literature. If narrative is to be understood as the telling and interpretation of events, real or imagined, for the benefit of others, then the proposal here is that narratives of land, especially those narratives used to support claims to land, play a significant role in shaping and understanding the identity of indigenous people and their relationship to land. The focus of this article is the Melanesian country of Vanuatu, which is located in the south-west Pacific. It is a country of around eighty islands and more than one hundred languages.¹ The majority of its population of just over 200,000 are indigenous ni-Vanuatu.

Melanesian people are people of place.² A person's identity is closely bound with where he or she is from. Thus in Vanuatu, while a person may reside in the capital, Port Vila, they are 'of/from Tanna' (*manTanna/womanTanna*) or one of the other islands, and often more specifically a locality within that island. Narratives relating to land are therefore narratives of being and belonging, as will be seen by the importance of identity of place. They are historically narratives of origin and survival, as is evidenced by stories of descent and rationales for relocation. In the contemporary legal framework, narratives are used as evidence to support land entitlement claims in an environment in which rapid land alienation under leasehold is taking place, much of it to non-indigenous people, although narrative also reveals the long history of such alienation. These narratives are bridges, negotiating the space between the **Int. J.L.C. 2* claimed past and the asserted present, and they are also lifelines for an uncertain future in a country where, despite the fact that approximately eighty percent of the population still depend on subsistence farming, land and its resources is increasingly seen as having commercial value, which should be exploited to meet development agendas. Indeed, the very existence of customary land tenure, with its uncertain and frequently disputed legitimacy, is seen as an obstacle to the smooth progress towards using land as a marketable commodity which can be freely traded.

The narratives under consideration are taken from recorded law cases. In recent years, disputes relating to land have been adjudicated by local, island and customary courts and the decisions recorded in law reports which are now being made publicly available. Although since 2001 it has been the Customary Lands Tribunals which have jurisdiction over land disputes, and indeed since their inception they have heard around 200 cases, most of the case-law for this paper has been taken from the Island Court reports.³ Case-law is one of the primary sources of the 'literature of the law'. These narratives of indigenous claims to land provide insight into past and present customary law, which is one of the official sources of law applicable in the country. In particular, free from the rules of

procedure and evidence that constrain the more formal court system, these case-studies reflect value systems in a shifting environment, where custom and customary law must work alongside bills of rights in written constitutions and the provisions of international conventions without losing its way. At the same time, the recording of narrative as evidence to support legal claims, and which converts oral histories into written records, imposes a form on narrative which may reshape it for future generations. Thus, the narratives which are brought to support land claims, by the claimants themselves and their witnesses, are both the telling of stories (the local term *storian* is often used), and the interpretation of events in order to achieve a particular outcome. The purpose of looking at case-law as narratives of indigeneity is not only to arrive at a better understanding of customary forms of land tenure and why these are often seen as being inimical to development and incompatible with introduced forms of land tenure, but also to consider how the narrative negotiates the space between the past and the present, between tradition and change.

The article commences by considering the historical and legal background to the present context in which land claims are being brought to the attention of the courts. It then looks at the nature of indigenous or customary land tenure, which is both evidenced by narrative and determines the narratives to be presented. Because custom in the country is not homogenous, different forms of customary tenure emerge from the body of case-law, both confirming this state of affairs and illustrating it. However, the narrative also shows that despite the persisting theme of difference there are similarities, and also that, far from being uncertain and unascertainable as is sometimes claimed by those who would suggest that the elusiveness and uncertainty of customary land tenure is an obstacle to land development, the grounds for customary land claims in a particular custom area are generally clear. What are more often in dispute are questions of fact rather than customary law. The article then looks at the framework and institutions for the adjudication of disputed land claims, noting the uneasy alliance between mechanisms for dispute resolution introduced under colonial and post-colonial influence and traditional dispute resolution practices residing in the role of chiefs, local councils and the power of 'Big men'. The article then examines reported cases to demonstrate how this information, which is produced to support or refute land claims, works in two ways: as evidence of narrative of indigenous land claims, revealing in its telling the relationship of indigenous people with the land; and, as narrative of evidence, the way in which stories and histories are used to link the past with the present to assert land rights which will survive into the future. Here, consideration is given to the way in which the **Int. J.L.C. 3* use and purpose of narrative, the forum in which it is used, the form in which it is presented and the background of those who hear it, may shape and change the narrative and consequently the customs which are related. The article concludes by reflecting on what can be learnt from these narratives and how pausing to listen to the stories might contribute to future dialogue on land issues in Vanuatu.

The historical and legal background

In common with many Pacific islands brought under colonial influence, indigenous land holdings and traditional culture and customs were disrupted by contact with Europeans. In the case of Vanuatu this was an Anglo--French Condominium government established in 1906. In the narratives of land claims there is reference to the land agents of this colonial government and their role in adjudicating disputes. There is also reference to the alienation of land to missionaries to set up churches and to settlers to establish plantations and farms in the early days of contact with outsiders. Later, land was taken by colonial authorities for public and administrative needs, but disputes over public land rarely feature in the case-law. The picture that emerges is one in which traditional patterns of land tenure were disrupted and influenced by this period of contact. Each case is only a microcosm of the larger picture. In the New Hebrides, as it was called, about two-thirds of land at one stage was in the hands of foreigners, and at the date of independence about twenty percent of the land remained alienated. Demands to reclaim the land fuelled agitation for independence, which was achieved in 1980. Many litigated claims to land traverse the pre-independence and post-independence period, and indeed this continuum is often essential for establishing a valid claim. This sense of continuity and rupture is reflected in the independence Constitution of the Republic of Vanuatu which, overnight, restored title to all the land, apart from a very limited amount of public land, to the indigenous custom owners,⁴ and provided that the rules of custom should form the basis for the use and ownership of land. To give effect to this, the Constitution stated that only indigenous citizens could have perpetual interests in land,⁵ thereby abolishing the concept of freehold, which had been introduced by the imperial powers. It is this fundamental constitutional right which underpins land claims. Settler occupants were required to vacate the land -- subject to compensation payments -- or to enter into fixed-term leases, governed by introduced principles of law, with the custom owners. This sudden shift gave rise to two basic problems. First, after a period of colonial settlement dating back to 1830, the original custom owners

could not always be ascertained and, even if they were, their claims might be disputed, especially if these purported owners negotiated leases which were subsequently challenged. Often identifying the custom owners took time. In the interim a number of people may have exercised rights over the land, either by occupation or cultivation, or under a lease or licence. The probability of disputes and the number of counter-claimants was high, especially in those areas historically most affected by colonial settlement. Second, while there had been a dual system of customary land tenure and introduced leasehold tenure under, and before, the period of Condominium government, the constitutional fiat necessitated retaining the legal institution of the lease in order to accommodate existing foreign settlers and to encourage the post-independence investment and development of land. Consequently, a parallel system of land tenure persists. While land held under customary land tenure -- approximately ninety percent of the land in Vanuatu -- cannot be alienated, it can be leased for a period up to seventy-five years, either to other indigenous people or to non-indigenous people. Once a leasehold is secured over land, that land can be subdivided, developed and also used as security for mortgage finance -- banks and lenders are **Int. J.L.C. 4* reluctant to lend against the security of land held under customary tenure for a variety of reasons.⁶ Not only do different legal regimes apply, but disputes are heard by different courts. Under the Land Leases Act 1983, only the Supreme Court has jurisdiction to hear disputes concerning leases.⁷ Disputes relating to customary land are, however, outside the jurisdiction of the Supreme Court and must be adjudicated by different courts (see below). Often, however, there are difficulties in drawing lines between customary land tenure matters and introduced land tenure matters, especially if the same plot or area of land is subject to a multiplicity of rights and interests. There are, therefore, parallel narratives taking place: those before the Supreme Court and Court of Appeal, where parties will usually be represented by lawyers, and where much may turn on the interpretation of legislation or the application of principles of case-law drawn from national or overseas jurisprudence; and those being articulated in the lower courts, where parties are frequently unrepresented, where the adjudicators may or must themselves be knowledgeable in custom and will invariably bring their own knowledge and views of custom to the process, and where there will be little if any written law to guide the parties. It is with this second category of narratives that this article is concerned.

The nature of indigenous land tenure in Vanuatu

The narrative of cases brought before the courts that adjudicate customary land claims reveals much about the principles of customary land law. These narratives, which are told and retold in contemporary settings, emphasise the importance of land to the identity of ni-Vanuatu, and demonstrate how the past informs the present and provides a continuum between tradition and the challenges of today. In recent years, concerns have been asserted that there is uncertainty regarding what the customary land tenure law is. For example, the 'Final Report of the National Land Summit' states in respect of the identification of legitimate custom land-owners, that one of the problems was that there were 'no clear custom rules available for chiefs to go by' (Tahi, 2006, p. 24). Similarly, writing about the land tenure system of South Efate, Fingleton and colleagues have stated that 'there is confusion about what is customary and how far *kastom* can form the basis for modern land tenure' (Fingleton, Naupa and Ballard, 2008, p. 29).⁸ Consideration of the case-law, however, suggests that this confusion is far less than might be claimed. While there may be dispute as to the weight to be attached to certain evidence, or dispute as to facts, the customary principles for establishing land claims are generally clear. So, for example, it is possible to learn from the narrative that traditionally rights to land were created by settling on the land and building the first *nasara* or meeting place there.⁹ Subsequently, title could be established through the physical evidence of graves, boundary **Int. J.L.C. 5* markers, the planting of trees, and oral evidence of lineage and certain ceremonies.¹⁰ In some cases, people from one island were allowed to settle on land in another island, either because of established blood or affinity links or as licensees fleeing disaster or fighting on their home island. These migrants came under the guardianship of the custom land-owners. The transfer of land from one generation to the next was in some areas matrilineal, and in others patrilineal. Sometimes it would change from one system to the other, and then back again, or be ambi-lineal. Tracing genealogies, therefore, was, and still is, an important aspect of land claims and is often contentious. Similarly, there may be differences in interpreting the applicable custom.¹¹

The reasons for claiming that customary law relating to land is uncertain or difficult to ascertain are unclear, but may well be influenced by the agenda of the claimant. Those who advocate facilitating the commoditisation of land may seek to avoid engagement with customary land tenure because it has a number of features which are unsatisfactory from a development point of view: for example, it is flexible, subject to different interpretations, unwritten, tricky to prove and subject to dispute. Others may find it convenient to present customary law as obscure and intelligible only to a select few, in

order to preserve its manoeuvrability, or to maintain secrecy about certain aspects of knowledge which are central to customary land laws. Even in the narrative presented in court, there may be no way of knowing, at least as an outsider, what is being withheld or manipulated to meet the demands of the forum of presentation and the needs of the claim.

Knowledge and the ability to use knowledge is power. Indeed, one of the issues raised by using narrative as evidence in a public forum is that it breaks traditional secrecy and guardianship taboos surrounding custom knowledge.¹² It may therefore also be the case that the evidence narrated in court is incomplete or changed, not only due to faulty memory or for a teleological purpose, but because there may be worse sanctions than losing a case. Also, the way in which narrative uses and relates custom may vary depending on who is the narrator. Over time this knowledge may become weaker, either because the keepers of the oral knowledge of custom become dispersed or disempowered with increased urbanisation, migration and the breakdown in traditional social ordering, or because there is diminishing respect for the keepers of knowledge, or because the knowledge becomes diluted or polluted by other influences. The narratives of customary land claims are therefore presenting interpretations of customs which are legitimated by links to the past but which are serving present purposes. In particular, the content of the narrative may be influenced by the purpose for which it is being used and also by the arena in which it is presented. This can vary from a gathering under a tree or at a chief's house, to a formal court in the capital, Port Vila.

Adjudicating land claims

The process of adjudicating land claims has become increasingly formalised. Traditionally, land disputes were resolved in custom, a process which seems to have survived the Anglo-French Condominium, except where such disputes were between indigenous and non-indigenous land **Int. J.L.C. 6* users and occupiers.¹³ At independence, in line with the constitutional provisions to give effect to the application of customary law to land,¹⁴ Island Courts were charged with resolving land disputes, with appeals going to the Supreme Court.¹⁵ Any Supreme Court judge hearing an appeal had to appoint two or more assessors, who were knowledgeable in custom, to sit with him.

The Island Courts Act 1983¹⁶ conferred power on the Chief Justice to establish such courts throughout the country. The jurisdiction of each court was to be determined by the terms of the Chief Justice's warrant for that court, although the Act envisaged Island Courts having both civil and criminal jurisdiction. They were to be supervised by a chief magistrate, but it was the President of the Republic 'acting in accordance with the advice of the Judicial Service Commission' who was to appoint 'not less than three justices knowledgeable in custom for each island court at least one of whom shall be a custom chief residing within the territorial jurisdiction of the court'.¹⁷ The court was fully constituted when sitting with three justices and a clerk, and the court was to 'administer the customary law prevailing within the territorial jurisdiction of the court so far as the same is not in conflict with any written law and is not contrary to justice, morality and good order'.¹⁸ The procedure of these courts was established in subsidiary legislation.¹⁹ The first courts were set up in 1984, and by 1999 there were eight such courts.²⁰ This meant that a number of areas did not have a court to hear disputes relating to customary land. Indeed, it has been suggested that '[T]he most obvious problem is the fact that many of these courts exist in name and warrant only. Adequate funding and personnel are lacking, so most island courts are mere fictions. Those that do operate tend to do so sporadically, resulting in large delays for complainants.'²¹ Although some of these issues have been addressed, it is still the case that there are only eight island courts, which means that many islands (out of the total of around eighty), even large ones such as Pentecost, are without a court.

More fundamentally the jurisdiction of those courts that were established under warrant encompassed not only people from different islands but also people observing different customs. This was hardly surprising, as 'Vanuatu is very ethnically diverse, with approximately 108 distinct linguistic and cultural groups ... with such cultural diversity there is no such thing as a single custom law that applies to all of Vanuatu ... [a] person may therefore be judged by justices who operate under customary norms that they are not familiar with'.²² The probability of complainants not being satisfied with the adjudication of disputes or with the outcome was therefore high. As a result, almost all cases were appealed to the Supreme Court, creating an insurmountable backlog of cases. Twenty years after independence, the Supreme Court refused to hear any more land appeals. In 2001, the civil jurisdiction of Island Courts to hear customary land disputes was removed.²³ **Int. J.L.C. 7* However, this did not remove the jurisdiction to consider cases pending before them, and eight years later Island Courts are still ruling on land cases.

The Customary Land Tribunal Act 2001 set up a new tier of courts to consider and rule on customary land claims. At present there is no appeal from the decisions of the highest Customary Land Tribunal to the ordinary courts, although the Supreme Court has a supervisory function under section 39.²⁴ Moreover, not all areas yet have Customary Tribunals, and the efficiency of those that do exist has been questioned.²⁵ A review of the Customary Land Tribunal system in 2004 found that there were considerable problems, including the fact that people were unaware of the tribunals and did not understand how they functioned; there was lack of support for them; and a general lack of ownership of them. Moreover, it was found that the new system was perceived by many chiefs to be undermining customary rules,²⁶ while in a number of areas disputes about rightful holders of chiefly title challenged the eligibility of those entitled to sit on the tribunals. There has, moreover, been judicial challenge to the competence of the Customary Land Tribunals to adjudicate custom land claims, thereby casting a shadow over their competence to be a forum for the final determination of land disputes.²⁷ In particular, the jurisdiction of chiefs to determine land issues has been questioned. Uncertainty as to the authority of chiefs to determine land issues strikes at the core of customs relating to land, and reflects the challenges of acknowledging and accommodating custom in an increasingly formalised setting.

Informal dispute resolution and the role of chiefs

In Melanesian society, chiefs are appointed rather than succeeding to the position by inheritance, as is more usually the case in Polynesian societies. As is often referred to in the case-law, there is a hierarchy of chiefs, with eligible candidates acquiring status as 'Big men' through pig-killing and other grade-taking ceremonies. While women may be accorded chiefly status and engage in pig-killing, the social hierarchy is predominantly patriarchal, with brothers, uncles and sons all ranking above wives and daughters, even when succession to land rights is matrilineal. Within this traditional structure it is customary to try and resolve disputes outside the formal process. Indeed, where there are no formal courts there was, and remains, no alternative. Chiefs and other influential people, such as village priests, elders or, more recently, politicians, are often involved in this. Yet their status or right to make rulings and the effect of their rulings are unclear. The Constitution states that the National Council of Chiefs 'has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages'.²⁸ It appears, although it does not say so, that this includes making statements of policy on land or customs regarding land, and as a matter of practice such statements are referred to by Island Courts from time to time.²⁹

The National Council of Chiefs (Organisation) Act 1985³⁰ says nothing about their powers, dealing only with the composition of the Council. Under the more recent National Council of Chiefs Act 2006, the functions of Island and Urban Councils of Chiefs are stated. These are: to resolve disputes according to local custom; to prescribe the value of exchange of any gift for a custom **Int. J.L.C. 8* marriage; to promote and encourage the use of custom and culture; to promote peace, stability and harmony; and to promote and encourage sustainable social and economic development.³¹ These provisions do not appear to give Councils of Chiefs at national, local or village level the power to determine land rights. Moreover, it remains unclear what the role or status of chiefs who do not sit on these various councils, but may nevertheless wield considerable local power, is. The formal incorporation of traditional structures into the national administration has, consequently, done little to create coherent and effective harmonisation between the custom of people and the state.

Even at the non-state level there are problems. In particular, the association of chiefly title with customary land tenure is difficult to separate. Indeed, it has been held that '[T]his chiefly system is attached or twined with the land tenure system'.³² This is because (traditionally) 'a chief once ordained by his paramount chief is always allotted a land to work. In return, such head chief must perform custom leases to the paramount chief or other subordinate chiefs who had allocated them Land.'³³ Moreover, in some parts of Vanuatu, such as north-west Malekula, rank and land rights are hierarchal, with a paramount chief granting land within his land to lesser chiefs, who in turn grant land to others within his bloodline.³⁴ The paramount chief is responsible for ensuring that everyone within the territory he governs has land, and for distributing it equally to subordinate chiefs.³⁵ However, as illustrated by the practice on the island of Ambrym, it is clear that while the person who originally settled on the land and exerted control over it was likely to become the paramount or senior chief:

'[T]he community as a whole would have other chiefs beside the land owning chief. A chief would normally be nominated by the community based on wealth, bravery and other common characteristics. The land owning unit would also have a chief, a nakamal and a nasara. There would

be other chiefs as well within his controlled land.³⁶

As these chiefs progress up the hierarchy of chiefly titles through pig-killing ceremonies, so their power and influence can increase, but equally it can be challenged, for example if they lose popular support.

The ambiguous role of chiefs, as both figures of authority and customary land owners, is further complicated by the fact that today, disputed chiefly titles are heard by the Island Courts, while land claims are heard by the Customary Land Tribunals, the composition of which invariably includes chiefs.

Diverging views were considered in the Efate case of *Billy v. Ameara*,³⁷ in which the Island Court stated:

'It was raised elsewhere in the proceeding that the presence of Chiefs means (the) right to land. Thus a chief is assumed in this reasoning that he is the owner of the land in which he presides or has influence over ... a contrary view which most Claimants support is that the best indicator to land ownership is obtained not by the presence of Chiefs, rather the presence of blood relationship. The second proposition would appear the better indicator to land ownership. Thus it would be true to say that not all Chiefs are of a bloodline who owns land, unless (a) Chief himself is from **Int. J.L.C. 9* the bloodline that owns or (is) entitle(d) to the land. In this circumstance issue of Chief Title is secondary to issue of land ownership, notwithstanding that both issues may overlap such as in the present case. The issue of Chief Title may be considered independently of (a) land claim.'

This confusion can be aggravated where trusts exist to manage the development of land for the purported benefit of custom owners.³⁸ For example, in the case of *Malas v. Tretham Construction Ltd*,³⁹ it was argued that the Chief of Mele (a village on Efate) had given his consent to an opposed development, in his capacity as representing the Mele Trustees, whose role was 'to represent the custom owners of the disputed land and ... act on behalf of the Mele village in all land matters relating to Mele Land'. However the Island Court held that the Chief:

'could not substitute himself (for) ... the custom owners and give right to a body such as the Trustees to act on behalf of the custom owners. The Mele Land Trustees ... representation is made on the basis that all custom owners consented to that effect. If a custom owner refuses to be represented by the Mele Land Trustees Limited the Mele Chief and his assistant could not give any authorisation to the Trustees to act on the custom owner's behalf without his final consent. The Chief has no authority to do that in the eyes of the Law. The authority of the Chiefs (if there is any) on his people and community is one thing and the rights of custom owner on the land is another thing. It is important to distinguish one from another.'⁴⁰

There is, therefore, the possibility of confusion between the role of chiefs as adjudicators of land disputes, as trustees of land for the people they represent, and as figures of status holding and controlling land rights. This presents a conundrum for law reformers. For example, a Customary Land Tribunal requires those who sit on its panel to be knowledgeable in the custom of the area, but it excludes as ineligible to sit anyone having an interest in the outcome of the case. In rural areas it is unlikely that a chief who carries any authority will not have any interest in the outcome, if only because the litigants or some of them are his supporters or relatives. Moreover, even if an adjudicator is not a chief, he (very rarely she) may have opinions about the applicable custom. For example, in a non-land case, the magistrate could not prevent himself from demonstrating his own familiarity with the customary view of adultery, stating that 'adultery is considered in Vanuatu Society *"founded on traditional Melanesian values ..."* as being a serious offence on the bases of Custom, and that, subsequently, any damages claimed therefrom against Co-respondents were customary punitive damages'.⁴¹ While this demonstration of custom knowledge may be more acceptable than either a non-indigenous judge or magistrate claiming to know what the custom is, or ignoring the custom because it is not sufficiently proved according to introduced standards of proof, it does nevertheless raise the question of the role of the adjudicator in shaping the narrative, either through the interpretive process of the individual adjudicator or because the narrative which is presented is modified for the particular audience. This leads to a consideration of the narrative used in land cases; its content, purpose and contribution to the contemporary role of custom in determining outcomes of land disputes.

****Int. J.L.C. 10* Evidence as narrative**

While it is difficult to divorce the narrative from the people who use it and hear it, and from the purpose for which it is being presented, it is suggested that the reported cases can be read in two ways. First, as evidence of narrative of indigenous customs relating to land, revealing in its telling the relationship of indigenous people with the land. Second, as narrative of evidence, reflecting the way in which stories and histories are used to link the past with the present to assert land rights which will survive into the future. At a basic level the cases which come before the courts are stories about people and events. Stories are told and unfold. Some are more credible than others. The evidence led in land cases tells many things, even when translated through the law report. In particular, the narrative illustrates ideas of being and belonging, of origin and survival, and the roots which anchor people to place. This history distinguishes customary land tenure from introduced ideas about land and land use and control. It is therefore fundamental to an understanding of the divergencies of approaches to land in a system in which there is a plurality of laws which govern it.

Narratives of origins

The strongest claimants are those who can establish that their family tree goes back furthest. This may mean not simply listing genealogies which stretch back many generations but also being able to narrate stories of origin. So, for example, a claimant in the case of *Alanson v. Malignman*,⁴² claimed that he could trace his roots to a founding creator. This consisted of 'three rocks that produced the first humans to live the land in which two of them are in the nature of humans a woman and a man. These two stones begat a bitch who then gave birth to the first twin humans, a male ... and a female.' The claimant argued that his family tree was traceable to these first humans. This story was elaborated upon by another witness, who stated that these early humans had been raised by a non-human -- an alien.⁴³

In *Sanhabat v. Salemunu*,⁴⁴ the story of origin presented to support a claim was that the:

'first ancestors were originated from two cone shells. These cone shells were once living in a cave ... At one time they had a row which resulted in one of the shells losing its tail. The broken tail changed into a turtle and swam to (a local place on the coast). There it gave birth to a female baby. While (the other shell) changed into an eel fish and swam up the river ... and finally formed into a male human.'

After a time these two humans met and formed a union, from which the ancestral line descended. In the same case, however, an alternative origin story was related, which was that the first two humans came from a liana or vine. The counter-claimant's origins were from a wild plant, from which came two males, who discovered two females in the location of a volcano (fire smoke) and formed a union with them.⁴⁵

What is interesting about stories of origin is not only that they are included in the first place as evidence of the ties that a claimant has with the land, but also that counter-claimants do not challenge these narratives, although they may seek to establish their own, prior, or superior origins.⁴⁶ Similarly, despite the strong influence of Christianity introduced by missionaries from **Int. J.L.C. 11* about 1830 onwards (considered below), narratives of land claims include stories of magic and sorcery, indicating not only a pre-contact link to the land but also reminding the audience that there are matters beyond the control of humans, or persisting powers which can be called on which are external to the court, the magistrate or judge, to determine outcomes. The decision of a court of tribunal may not, therefore, bring finality to the matter.

Narrative of magic and sorcery

While references to magic are not frequent, they are not entirely absent, and it is important to note that belief in the power or practice of sorcery is not just historical but of contemporary significance.⁴⁷ For example, in *Alanson v. Malignmen* there is reference to a tree, the leaves of which, when they fall, turn into snakes. Knowledge of this was presented to support the claimant's case to a particular place (*nasara*) marked by this tree. However, his claim was weak, not because of this story, but because he could not correctly name and identify other *nasaras* in the area or relate the different grades of chiefs. A competing claimant held that his family had been forced to leave the land because of 'a custom spell upon his tribe whereby flocks of rats ... devoured all their subsistence crops'. This was put forward to justify a break in the link to the land, which was beyond the power of men to control. In *Rory v. Rory*,⁴⁸ it was claimed that a 'magical man' had 'caused a tidal wave' which sank an island, thereby explaining why claimants had been forced to move; in *Hiatong v. Tavulai Community*,⁴⁹ magic had been used to kill a dwarf and to persuade certain parties to commit adultery; while in

Houlon v. Edward,⁵⁰ 'a chief got very ill after walking over a human bone cursed with a cast of death spell'. Similarly, in the case of *Manassah v. Koko*,⁵¹ there are three different versions of how a barren wife was helped to have a child. One is that she saw the vision of a child in a tree and went into labour; another is that a child was found at the roots of a special tree wrapped in a coconut mat; and a third is that, while digging yams she found a baby by the yams. Each story was raised to justify the name given to the child, which linked the child to the relevant lineage, thereby providing evidence of the necessary generation chain.

Such events, presented in the contemporary setting, were relied on to explain disrupted chiefly lines, mixed genealogies and failures to remain in occupation of land now being claimed. While some of the narratives of magic may be used to explain natural events, such as tsunamis, volcanoes or earthquakes, these narratives cannot be lightly dismissed as mere fabrications to gloss over gaps in the evidence, because they are presented as fact and go unchallenged. Moreover, there appears to be no recognised incongruity between these narratives being used alongside claims based on modern legal ideas, such as fundamental rights, gender equity, documents of title, court rulings or modern case precedents.

Interrupting both the content of narrative and the lines of claims are incidents of early contact with outsiders. Although framed historically, these factors continue to be of crucial relevance to present land claims, not only because land use and occupation was disrupted but because the legacy of missionaries, settlers and colonial administration shaped and informed contemporary language and concepts of land interests, in respect of the legal determination of land rights.

***Int. J.L.C. 12 Early colonial contact**

There is no great debate that the arrival of Europeans, especially missionaries, impacted on the lives of Pacific islanders and that the consequences of this continue to be evident today, especially in the way in which missionary teaching influenced and became integrated with custom. The narratives of land claims are therefore narratives of Vanuatu's history,⁵² and an explanation for much of the present. For example, missionaries changed the way in which chiefly titles were determined and transferred.⁵³ Missionaries also strengthened the patriarchal ordering of society, which some feminists in Vanuatu assert was much more egalitarian under pre-contact custom. For example, in the case of *Awop v. Lapenmal*,⁵⁴ the Bible's Book of Numbers, 27:8, was relied on to support a claim that only in the event of there being no male heir should a daughter inherit. Contact with Europeans also had a physical impact on land rights because outsiders introduced diseases which decimated populations, causing their relocation and subsequent land disputes regarding the nature of their occupation rights on land where they had taken refuge or occupied as licencees permitted to cultivate the land.⁵⁵ In some places, the arrival of missionaries and settlers prompted the migration of custom owners to other parts of the islands where they held land,⁵⁶ especially where these missions physically gathered converts around them or drove the non-converted away.

The involvement of colonial officers also muddled the waters in land disputes, for example, by becoming involved in boundary disputes,⁵⁷ or the adjudication of land claims.⁵⁸ Decisions made by one colonial agent were not always followed by another, especially if one was French and the other English, with resulting inconsistencies claimed by contesting custom owners. There is also evidence of early land alienation,⁵⁹ sales of land to settlers and missionaries,⁶⁰ ***Int. J.L.C. 13** and the unequal bargaining power that existed between indigenous custom owners and the incomers.⁶¹

These are some of the histories which emerge from the narrative, and demonstrate the way in which stories and histories are used to link the past with the present in order to assert land rights which will survive into the future. The role of narrative as evidence, the forum and form in which it is presented, shapes and may change the narrative and consequently, although perhaps imperceptibly at first, the customs which are related. In this way, custom adapts and is adapted, the narrative constructing a bridge between past and present, between what is traditional and what is necessary to accommodate changed circumstances and future challenges.

Narrative as evidence

The rules of evidence that apply in Vanuatu are based on laws introduced under colonial administration. However, in the case of Island Courts and Customary Land Tribunals the normal rules of evidence are modified. The Island Courts Act states that: 'In any proceedings before it, an island court shall not apply technical rules of evidence but shall admit and consider such information as is available.'⁶² It is not unusual, therefore, for evidence to be hearsay, or based on opinion rather than

fact. In the case of land claims, the procedural rules also provide that each claimant and defendant -- or counter-claimant -- can call five witnesses. These witnesses give written evidence in advance of the hearing and are then questioned on this evidence. The process is therefore one of translation and re-translation. Witnesses may write their own statements or they may dictate them prior to the hearing. They are then subject to oral examination and may elaborate on the evidence previously given in their written statement.

Evidence of fact: boundaries and genealogies

The two main types of evidence that tend to be offered in land disputes are narratives of boundary descriptions and narratives of bloodlines. Boundary descriptions involve tracing the physical boundaries of land by reference to physical objects, such as paths, streams, trees, rocks, rivers, and later gates, roads, fences, airstrips, schools and churches. Names given to places -- especially in the local language -- are also significant, as is the ability to identify them on a site visit. These visits are required by law in the case of land claims.⁶³ Narratives of bloodlines are extremely complex and often confused by factors such as custom and baptismal names applying to the same person, or an accumulation of names over the course of a lifetime through the acquisition of titles through grade-taking; polygamy; adoption; and the misspelling of names when committed to writing. It also clear that genealogies can be manipulated and selectively created to achieve desired outcomes.⁶⁴ Challenges on the grounds of falsified or fabricated family trees are common. Genealogies will often need to be corroborated by supporting genealogies, or may be undermined by challenging the number of generations recalled or weaknesses in related evidence such as custom ceremonies linked to awards of status, or claims to long histories which are not supported by physical evidence -- for example, the number or size of stones used to mark pig-killing rituals. It is rare that documents are produced to support genealogical claims -- for example, birth or death certificates -- although occasionally letters or documents relating to land transactions are used. These are, however, rarely **Int. J.L.C. 14* treated as conclusive evidence. The ability to provide evidence which links the physical aspects of the land with people and their genealogies determines the strength, or weakness, of any claim.

Evidence to support witness credibility

One of the interesting features that emerge from the reported cases is how the credibility of a witness is assessed in a customary context. With boundaries, attention to detail is important, with that detail being repeated or corroborated by other witnesses. Statements that are too general or lack specificity are suspect. Witnesses who are migrants or recent arrivals -- even though their ancestors may have been there for several generations -- are considered less reliable than those who can trace their family trees back many generations and can provide correct names and sites for *nasaras* or *nakamals*. Similarly, a shared dialect or familiarity with the local names for trees, people and places is important, as well as knowledge about local customs and customary ceremonies. Good witnesses must be able to link different evidence, for example chiefly systems with land tenure systems, or custom ceremonies with land rights, and must be able to distinguish different hierarchies of chiefs and the different forms of ceremonies appropriate for conferring different rights or obligations. In weighing the evidence, the Island Courts appear to be looking for discrepancies, contradictions and lack of sufficient corroboration by witnesses to support claimants. While previous decisions made by various local custom courts or hearings may be mentioned, there is no sense of being bound by them, especially as the records of these decisions are usually unwritten. However, a succession of adjudications favouring a claimant will add weight to the claim, not because of the formality of the adjudication but because it is evident that the claimant's story has been tried and tested on several occasions.

Evidence as narrative of *kastom* and customary law

Where land falls to be governed by the 'rules of custom', the evidence presented in these land cases gives us some indication of what this custom is, although it is not always clear whether the custom referred to amounts to a 'rule'. For example, the case-law reveals much about customary land tenure, including cosmology and rituals that inform human associations with land; the importance of ancestors and kinship structures; the significance of physical features; and the importance of oral history. To amount to a rule, however, there needs to be evidence of expectation and compliance. An example can be found in the custom of Tongoa, Shepherd Islands and parts of North Efate, that where a paramount chief grants land to use to a lesser chief, the latter must:

'perform custom leases to the paramount chief or other subordinate chiefs who had allocated them Land. There are two types of custom leases namely '*Fanga Sokora*' (first harvest of vegetables) and '*Nasau Tonga*' (harvest of animal) paid to the chief. This is a customary obligation that is practiced from generations [sic] to generation throughout the Shepherd Islands.'⁶⁵

The 'leases' referred to here appear to be the payment of tithes or rents and not an estate in land for a period of time, as understood in the common law. Similarly, in Epi 'there is a customary obligation for a Paramount Chief to allocate land to his assistants together with their boundary limits. As a matter of reciprocity a custom lease is normally paid to the paramount Chief ... any isolation or absence of these founding aspects to land would prove an invalid custom.'⁶⁶

Sometimes it is difficult to determine where a custom ends and a rule begins, suggesting that traditionally there is no clear distinction between practices which are followed and those customs which are rules. For example, the cases reveal that in central Malekula the communal ownership of **Int. J.L.C. 15* land is based on three elements: 'common descent, residence within a *nasara* and participation in common activities'. Individual rights are dependent on a person's association with a tribe or a bloodline -- through affinity or consanguinity -- which in turn is 'identified with the land through their *nasaras*'.⁶⁷ Patrilineal inheritance through the eldest son predominates. However, the eldest son is expected to provide for equal distribution among his siblings. Matrilineal inheritance only comes into play if there are no male heirs, and then only as an interim measure.⁶⁸ However, there are 'customary obligations that requires [sic] strict performances in order that the right to own the land can be transferred to the mother's children'. These are explained in *Tomoyan v. Shem* :

'[T]he mother's line ... is under customary obligations to provide some genre of customs gifts or payment of recognition to the patrilineal line. Such sort of ritual would in return allow and guarantee the children of the mother having blood connection to the patrilineal line to secure some rights of use of the land of their male heirs.'⁶⁹

Through observation of this ritual, the paramountcy of patrilineal succession appears to be preserved and the inferior position of matrilineal succession confirmed. Further, anyone adopted into a bloodline has a lesser right than a natural member of that bloodline: 'adoption is only a sign of acceptance to live under the guardianship of another family ... this acceptance or recognition would only exten(d) to the right to use the land excluding ownership.'⁷⁰ Here, the inferior status of an adoptee is reinforced by inferior land rights.

The above suggests a practice or rituals and customs which have very clear consequences if not complied with. However, similar practices elsewhere may not be matched by similar consequences. There are no national rules of custom but rather a lack of homogeneity of traditions and customary forms, as is evident from the case-law. For example, the island of Malekula has two main tribes, *Big Nambas* and *Smol Nambas*, and there are variations in customs within these.⁷¹ For instance, in the case of *Kaising v. Kaite*s,⁷² it is explained that:

'the custom practiced in this locality varies from that habitually observed by the Smol Nambas tribe in the central part of the island of Malekula. A *nasara* is divided into three *nakamals*. It is often described in the following words "*A nasara is like a house which has three main parts, the front, the body and the back or tail*". Authority or respect is always paid to the head or front of the mansion. The head of the house or *nasara* is traditionally called (*Amai*), the body (*Amahai*) and the tail (*Amesuwe*).'

By contrast, in the south of the island of Pentecost, where the arrival of settlers and missionaries dislocated and uprooted the indigenous people, it appears that land use and ownership rights may be acquired not only by bloodlines but also through the appropriate performance of custom ceremonies, for example pig-killing, observing funeral duties and rituals, and ensuring that infant children are reared on the land.⁷³ In this way, land roots for uprooted people can be established. In contrast, **Int. J.L.C. 16* where people were left relatively undisturbed in their enjoyment of land, such as in the island of Ambrym, it has been explained that:

'ownership of customary land is communal or collectively owned based on common descent, residence within a *nasara* and participation in common activities. A tribe or bloodline is identified with the land through the *nasaras*. Individuals within the clan are closely tied up with their territory by affinity and consanguinity through blood and marriage. A group of persons belong to a family line and a territory is sometimes identified with a totem, such as a plant or an animal.'⁷⁴

As will be noted, this diversity of applicable and observed customs presents challenges for developing either a coherent body of custom law, or a national land policy which can demonstrate its appreciation

of customary practices by integrating them into proposals for land development. Pinpointing custom can be time-consuming and frustrating for land development advocates, even when that custom can be 'captured' through the process of formal hearings and recording.

Narrative as record

Despite the modification of rules of evidence indicated above, the fact that parties are unrepresented by lawyers and so represent themselves, and that those who sit to hear customary land claims are expected to be knowledgeable about custom, it is inevitable that committing the record of the court or tribunal deliberations to writing will change the narrative. Much will depend on the degree of articulateness of witnesses, the literacy skills of the court clerk or tribunal secretary, and the accuracy with which statements are recollected and recorded. This process of recollection and recording is part of the organic development of narrative. It is also bringing custom into the twenty-first century.

Converting oral histories

The recording of oral evidence creates a permanent record of testimonies. In some cases the witnesses are very old and their histories, which cover the pre-independence and post-independence period, may otherwise be lost.⁷⁵ Indeed, in *Selangi v. Donna*,⁷⁶ it was held that merely giving evidence in court of customary practices -- here black magic -- was not enough; '(a)ll the defendants in Court, needed someone of old age to explain further and into detail the ways and practices of the black magic in the olden days' in order to compare past custom with alleged current practice. Current practice, whether in sorcery or land claims, would appear to have no validity unless it can be shown to have evolved from past practice. In the case of customary land tenure, these narratives, imperfect as they perhaps are, may be the closest we can get to first-hand accounts of customary land tenure in the early days of contact with introduced legal systems, untainted by the lens of the colonial historian/administrator or missionary. At the same time, however, there is the danger that this 'codification' through court/tribunal recording, will rob custom of its essential and necessary flexibility.

Setting precedents

Once there is a written record, then there is the possibility that this will be referred to in future cases, partly due to the rule of precedent which informs the jurisprudence of the courts in common-law influenced systems, and also because similar fact cases will lend themselves to recollected former **Int. J.L.C. 17* decisions. In this way, previously oral evidence may become frozen in time and less adaptable to changed or changing circumstances. The development of certainty through case-law is part of the common-law mind set, which dislikes in particular uncertainty as to ownership of property, the idea of land lying waste or idle, or the possibility that a case once decided upon could be reopened by subsequent parties. Evidence of this process can be found in some of the more recent judgments of the Malekula Island Court, where the narration of 'the Law, Custom and History' -- a standard heading in the report -- is being repeated almost verbatim from previous cases even where the land is situated in different places, probably because the clerk to the Court is copying it each time from a previously recorded case.

Translating narratives

It is also probable that the language of the court may change the narrative. Court proceedings are in Bislama, a form of 'pigeon English', which is one of the three official languages of the Republic of Vanuatu. Where a witness or claimant does not speak Bislama then an interpreter may be used. The language of the court record, however, may be in English or Bislama (or potentially French). However, the languages of formal education are English or French, so the ability to write Bislama tends to be learned informally -- with consequent variations in spelling. This process of literal interpretation and recording, which inevitably shapes and changes the narrative, also reflects the cultural hybridisation that has taken place in Vanuatu, from the early arrival of missionaries to the recorded minutes of the Customary Land Tribunals.

'Legalising' language and concepts

It is also the case that as more parties resort to litigation before the formal courts or tribunals, there is a greater likelihood that legal language or concepts may be adopted.⁷⁷ In some cases, this has a significant effect on the application of customary practice. For example, in *Awop v. Lepenmal*,⁷⁸ consideration of the Convention on the Elimination of all forms of Discrimination Against Women

(CEDAW),⁷⁹ read with the written provisions of the Constitution,⁸⁰ led to the court holding that advancing the traditional superiority of land claims based on patrilineal descent and affiliation over matrilineal ones was discriminatory, despite the fact that the claim being sought was a historical one, not a contemporary one.⁸¹ Similarly, in the case of *Haitong v. Tavulai Community*,⁸² evidence was led that indicated land had been taken by force and settled on by the victors, who later alienated some of it to foreigners. The court held that not only was the idea that land taken in battle became the victors contrary to customary practice -- when the opposite seems to have been the case in several areas -- but also that 'This is a selfish idea and cannot find favour in this modern world with laws upholding principles of natural justice, fairness and equality'. Consequently, land obtained by conquest had to be returned to the original owners -- even where these had been decimated or scattered by the tribal **Int. J.L.C. 18* warfare. Arguably, this retrospective application of contemporary legal principles to fact-based claims of historical events is inappropriate and was not intended under the provisions of the Constitution.⁸³ This approach may also be inconsistent with the fundamental meaning of custom, which has been defined by the court to be '*rule blong law we ifomem fasin mo conduct blong pipol long wan society we hemi establish bifo finis mo ino replacem any kastom. Law ia oli no writem daon mo pipol iliv wetem*' (translated as 'A long-standing legal rule which determines the way in which people of a society conduct themselves and act, which informs but does not replace custom. Such a law is not written down but lived').⁸⁴ Magistrates and others involved in these hearings are, however, illustrative of the nature of development happening in countries such as Vanuatu. On the one hand they are adjudicating customary land claims based on custom laws, on the other hand they are often university educated, or do not wish to appear ignorant or uninformed. They must walk the tightrope between tradition and modernity.

As the value of land as a marketable commodity increases, it is likely that more litigation will ensue, and while representation by lawyers before the customary land tribunals is not permitted by the legislation, it is highly probable that those who can afford to will seek professional or quasi-professional assistance.⁸⁵ This in turn is likely to further emphasise inequalities in access to justice and distribution of economic benefits which are already prevalent in Vanuatu. It may also give rise to more appeals, including appeals to the Supreme Court for non-compliance with procedural requirements, especially if 'legal advisers' can find procedural loopholes to exploit, with the related consequences of delay, expense and the possibility of self-help measures being taken in the interim. Indeed, one of the adverse consequences of developing wider access to formal courts is an increase in litigation, particularly by those who feel that they have lost out under the informal, traditional system.

Learning from narratives of land

Land claim disputes arise for a number of reasons and are not solely of recent origin. It is evident from the narratives of land claims that customary land tenure reflects a process of adaptation and survival, seeking to accommodate a multiplicity of land usages and to tolerate different interests. Customary land claims tend not to be linear but to change direction according to necessity and circumstance. Nor are they temporally certain -- as a lease might be. For example, rights of use may be until crops can be re-established after cyclone devastation -- a matter of months or years -- or granted and enjoyed for several generations. While the antecedents of land interests may be claimed to be from as far back as can be recounted (certainly not time immemorial), it is not clear that future rights are seen as persisting in perpetuity. Certainly no individual or present incumbent could claim to have rights in perpetuity owing to the communal nature of land rights and the temporal and spiritual nature of those rights. It is also evident that indefeasibility of title based on a state register is inherently alien to customary land tenure,⁸⁶ and even if documents are produced to support a **Int. J.L.C. 19* claim they may be viewed with suspicion, regarded as unreliable, and at best only one aspect of evidence that may be taken into account. Registering title or an interest, does not, in custom, make it absolute.

Against this background there is the challenge of the increasing prevalence of land disputes as a consequence of claimants seeking either to develop the land themselves, or to negotiate a lease with investors who will develop the land.⁸⁷ The intervention of a legal process which tends to arrive at winners and losers may also have increased the tendency to litigate and to appeal against the decisions of chiefs, informal courts or lower tribunals.

The transition between an adjudication system which seeks to defuse disputes by negotiation and compromise and one which seeks to establish certainty and finality is evidenced by the remedies which are found in land claim cases. These are a mix of introduced remedies, such as injunctions,⁸⁸

and customary remedies, such as allowing continued joint usage of land.⁸⁹ Sometimes the remedy awarded leaves itself open to future problems. For example in *Mata v. Mata*,⁹⁰ the unsuccessful claimants were ordered to vacate the land within twelve months unless other proper arrangements were made. What these were to be was left unspecified by the court, leaving a wide margin of discretion to the parties themselves to negotiate an acceptable outcome. In *Tabi v. Tabisari*,⁹¹ although the land dispute was settled, no orders were made regarding other rights, such as the right to collect coconuts, make gardens and graze cattle enjoyed by the counter-claimants. In *Sanhabat v. Salemunu*,⁹² an order was made regarding those unsuccessful claimants who remained on the land but it was left to these respective parties to make appropriate arrangements with those whom the court had declared to be the custom owners. In *Rory v. Rory*,⁹³ no finding of ownership was made, leaving the various parties with their continued, shared, right of use over the land claimed, leading, one would have thought inevitably, to renewed dispute at some point. This lack of conclusiveness is perhaps a reflection of the desire to arrive at a decision which is fair to everyone and a pragmatic recognition of the need for compromise in a plural legal system. Indeed, one of the reasons why appeals occur is that if a decision favours one claimant, it is perceived as not being fair to other claimants, and that the tribunal failed to take into account equally the evidence of all the parties. In custom therefore, there seems always to be the possibility that rights can be renegotiated or disputes reopened.

Conclusion

Post-colonial narratives of land presented as evidence in reported cases are illustrative of a negotiated space, both temporally -- between the historical past and the contemporary present -- and formatively -- through a process of reporting and interpretation tempered to meet the demands of an imposed forum: the court or tribunal established by legislation. This process may be seen as undermining or distorting customary forms by insisting on compliance with an introduced dominant form, with a **Int. J.L.C. 20* consequential corruption of the narrative. However, bringing narrative of customary land claims into the public domain may be a way of manipulating contemporary forms to preserve the traditional past. The use of adaptive communication provides an opportunity to make accessible to others what might not otherwise be accessible, and in this regard could be seen as a way of strengthening the role and relevance of custom. In particular, customary narrative, however modified or constrained, is engaging with the rule of law to present a contemporary sense of identity in respect of land. This aspect of narrative may be particularly important where customary land tenure is under threat and the nature of indigenous identification is facing multiple challenges.

This is as true of Vanuatu as of other least-developed small-island states. The communal and custodial nature of customary land tenure, which sees the rights of individuals to deal with the land as curtailed by their obligations to look after the land for future generations and to maintain links with past generations, is often perceived as being an obstacle to development, a barrier to attracting inward (foreign) investment, and an underlying cause of failure to achieve economic growth. At the same time the emergence of indigeneity as a matter of considerable significance both globally and regionally is prompting traditionalists and emerging modern activists to assert aspects of national uniqueness and difference. Among such assertions is the importance of customary forms of land tenure and resource management.

While narratives of land claims through case-law are presented in a disputative context, it might be argued that present pressures to arrive at finality and legal certainty are the underlying cause of much of the litigation, because it is clear that traditionally adaptation and survival strategies in the use and management of land have created a multi-layered system of land-holding in which grants of land use, rights of cultivation or occupation, or both, may be conferred on a succession of groups or individuals for a variety of reasons over an extended period of time. If the achievements of customary land tenure as demonstrated by the narrative of land claims are not realised, and a new, imposed narrative is advocated or adopted to obliterate indigenous narrative without allowing for an organic process of adaptation, then there is the danger that the customs that hold people together will disintegrate, and that they will lose their sense of identity with place, and their sense of self, because they will have no stories. It is suggested therefore that law reformers, policy-makers and aid-donors with foreign agendas should look beyond the basic legal and administrative framework and consider the many different narratives of land, including case-law, which provide a continuum between the past and the present and can be used to inform the future direction that land policy and land law should take.

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1. Islands mentioned in this article include those of Ambrym, Efate, Erromango, Malekula, Paama, Pentecost, Shepherds, Tanna and Tongoa.
 2. It has been stated that 'Land means life to the nation's indigenous population or, in other words, No Land, No Life' (Vanuatu Report to the United Nations HRI Core documents, 1998, para. 19).
 3. Publicly and freely accessible electronically via <www.PacLII.org>, whereas the minutes of decisions of the Customary Land Tribunals are unpublished and only available on payment from the Department of Lands. Translations, where given, are the author's own.
 4. Article 74.
 5. Article 75.
 6. For example, the lender may be reluctant or unable to come into possession to manage the land and will be unable to sell the land as customary land cannot be alienated. The land could be leased, but if it is located in a customary land area this could cause social tensions.
 7. Land Lease Act (Cap 163) sections 1 and 100.
 8. *Kastom* is the Bislama version of 'custom' or 'customary'.
 9. *Nasara* -- dancing ground or public area in a village (Crowley, 1995, p. 165). See, for example, *Manassah v. Koko*

[2005] VUIC 3, in which it was explained, with reference to land tenure in Malekula, that 'In this region, land is communally owned based on common descent, residence within a *nasara* and participation in common activities. A tribe or a bloodline is identified with the land through its *nasaras*. Within an original or big *nasara* there are small *nasaras* or *smol faea* which are associated in some respect with the original *nasara* and its paramount chief. The same word *smol faea* is interchangeably used for referring to a subordinate or lower chief. The same token is applied with the word *big faea* meaning higher chief. Individuals within a tribe are closely tied up with his territory by affinity and consanguinity through blood and marriage.' Similarly, in Paama it was stated 'generally the island of Paama is predominantly a patrilineal society. Ownership of customary land is communal or collectively owned based on common descent, residence within a *nasara* and participation in common activities. A tribe or bloodline is identified with the land through the *nasaras*. Individuals within the clan are closely tied up with their territory by affinity and consanguinity through blood and marriage. A group of persons belong to a family line and a territory is sometimes identified with a totem, such as a plant or an animal' (*Holuon v. Edward* [2007] VUIC 4).

10. For example, where pig-killing is the standard custom ritual for ascending through the ranks of chief, stones may be used to mark pig-killing sites (*Sanhabat v. Salemunu* [2005] VUIC 6). Customs to do with marriage, adoption and burial are also frequently recalled.
11. For more detailed anthropological comment of customary land tenure in Vanuatu, see Guiart (1996, p. 1) and Rodman (1995, p. 65).
12. For example, in an unreported minute of the Malmetervanu Custom Island Land Tribunal, one of the witnesses pointed out that the tribunal was breaking the custom law by talking about the chiefly bloodlines (*Metemal case* Land Appeal Case No. 1 2008. Ref. 09/09LT/111).
13. In such cases, British and French agents seem to have intervened, at least until the Joint Court was established under the Condominium government in the 1906 Convention.
14. Article 78(2).
15. Island Courts Act 1983, supplemented by the Island Courts (Power of Magistrates) Order 2003; Island Courts (Supervising Magistrates) Rules 2005; Island Courts (Civil Procedure) Rules 2005; Island Courts (Criminal Procedure) Rules 2005; Island Courts (Court Clerks) Rules 2005; Island Courts (Amendment) Act No 29 2006.
16. Cap 167.
17. Section 3(1).
18. Section 10.
19. Island Courts (Civil Procedure Rules) 1984 as amended.
20. Jowitt 1999.
21. Ibid.
22. Ibid.
23. Island courts (Amendment) Act 2001, came into effect in 2002.
24. Exercised in *Umou v. Erromango* [2008] VUSC 65.
25. See 'Customary Land Tribunal Progressive Report 2003' Republic of Vanuatu, Department of Lands.
26. Regenvanu, 2008, p. 65.
27. Mackenzie, 2006, p. 4.
28. Article 30(1). It also has the right to 'be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament'.
29. See, for example, *Awop v. Lapenmal* [2007] VUIC 2.
30. Cap 183.
31. Section 13.
32. *Mata v. Mata* [2003] VUIC 1.
33. Referring to the custom of Tongoa, Shepherds and North Efate.
34. Not dissimilar to the feudal pyramid introduced under Norman rule in England in the eleventh century.
35. *Sanhabat v. Salemunu* [2005] VUIC 6.

36. *Welwel v. Family Rorrmal* [2007] VUIC 5.
37. [2004] VUIC 3.
38. Some aspects of these trusts are similar to the equitable concept of trusts, others are not. There are a number of trusts in place for the management of land which generates income around the capital, Port Vila. Often they are poorly regulated, the rights of beneficiaries are precarious and the trustees rarely held to account.
39. [1995] VUIC 1.
40. Lunabeck Senior Magistrate (now Chief Justice).
41. *Waiwo v. Waiwo* [1996] VUMC 1. On appeal the court took a rather less customary view of punitive damages for adultery, although it upheld the principle of the award while reducing the quantum.
42. [2004] VUIC 2.
43. Origins from stones are also found in *Metenesel Amileacos Land Appeal Case No 1*, 2008. Malmetenvanu Custom Island Lands Tribunal, 28 October 2008, unreported minute.
44. [2005] VUIC 6.
45. Other claimants indicated similar stories of origin -- from plant materials or from shells.
46. Similarly narratives about dwarfs, devils or sorcerers are not challenged.
47. For example, the case of *Selhangi v. Donna* [2005] VUIC 2, is entirely about black magic -- although not a land case.
48. [2007] VUIC 6.
49. [2007] VUIC 3.
50. [2007] VUIC 4.
51. [2005] VUIC 3.
52. There is, for example, reference to cannibalism. In *Rory v. Rory* [2007] VUIC 6, the original claimant's narrative includes the statement: 'A child was killed and eaten during a ... a customary rite to commemorate ... (a) brother who died during the fight.' There is also reference to the fact that people tended not to move much outside their land boundaries because of tribal fighting and cannibalism in a number of Malekula cases.
53. See *Tenene v. Kalmarie* [2002] VUIC 1, in which it was observed: '*Olgeta itokabaot tu olsem wanem Missionary ikam mo jenesim olgeta fasin ia mo mekem se olgeta inomo folem hemia blong appointem wan niu Jif mo replacement blong olfala Jif tru long kastom fasin*' (translated as 'Everyone knows how the missionaries came and changed all the customary ways and made it so that people no longer followed the traditional procedure for the appointment of a new chief or the replacement of an old one'). In *Alanson v. Malingmen* [2004] VUIC 2, there was evidence that the missionaries forbade pig-killing to mark custom adoption, insisting instead on a money payment.
54. [2007] VUIC 2.
55. For example, in *Mata v. Mata* [2003] VUIC 1, it was reported that 'sometime(s) during the colonial era a dreadful disease *sisit blad* [probably cholera] has largely affected the people of Lupalea village. In consequence, a vast majority of the population was wiped out. To prevent the spreading of this disease, the remaining villagers were advised to move to the nearby village ... only 6 people of (the) ... village were evacuated without being affected.' Natural disasters were also a cause of relocation, for example famine in *Mulon v. Maltape* [2004] VUIC 1, volcanic eruption in *Mata v. Mata* [2003] VUIC 1, and tribal warfare in *Alanson v. Malingmen* [2004] VUIC 2.
56. *Tabi v. Tabisari* [2004] VUIC 5.
57. *Mata v. Mata* [2003] VUIC 1, where it was observed that the dispute dated back to the 1920s without resolution, British agents and the local council of chiefs coming to different decisions.
58. *Awop v. Lapenmal* [2007] VUIC 2, which refers to French and British agents adjudicating a land dispute in 1963.
59. For example, a sale of the land to a French Planter, Barthelemy Gaspard dated 15 March, 1886, in *Family Mokono v. Peter* [2003] VUIC 2, although there was some concern that the sale or at least the documentary evidence of it may have been fraudulent; the sale of land for trade goods to a settler in 1907 in *Alanson v. Malingmen* [2004] VUIC 2.
60. For example, Christian missionaries at Port Stanley in the early twentieth century in *Alanson v. Malingmen* [2004] VUIC 2; the Seventh Day Adventists in 1931 in Ambrym, in *Tomoyan v. Shem* [2007] VUIC 1; and the Catholic Mission in *Family Mermer v. Taliban* [2003] VUICB 2.
61. For example, a sale for 'some Tobacco, a Musket and other goods' in *Manassah v. Koko* [2005].

62. Section 25 Island Courts Act Cap 167.
63. Rule 9.
64. To the extent that the court is unable to reach a conclusion, as happened in *Billy v. Ameara* [2004] VUIC 3, in a dispute that had been pending for twenty years.
65. *Mata v. Mata* [2003] VUIC 1.
66. *Family Mokono v. Peter* [2003] VUIC 2.
67. *Alanson v. Malingmen* [2004] VUIC 2; confirmed in *Sanhabat v. Salemunu* [2005] VUIC 6.
68. Reiterated in *Abel v. Timothy* [2005] VUIC 5.
69. [2007] VUIC 1.
70. *Alanson v. Malingmen* [2004] VUIC 2. This is distinguishable from the view of the National Council of Chiefs -- the Malvatumauri -- which suggests that adoption after a period of four or six generations would confer full rights of ownership. In central Malekula, this would only be the case if there were no bloodline male heirs.
71. A *nambas* is a traditional penis sheath.
72. [2006] VUIC 1.
73. *Tabi v. Tabisari* [2004] VUIC 5. In this case it was held that land could pass through both sides of the family.
74. *Welwel v. Family Roromal* [2007] VUIC 5.
75. For example, in *Family Mokono v. Peter* [2003] VUIC 2, a witness in her early 80s; in *Mata v. Mata* [2003] VUIC 1, a male witness who was 72; while in *Alanson v. Malingmen* [2004] VUIC 2, one of the witnesses was reputed to be over 100.
76. [2005] VUIC 2.
77. For example 'time immemorial' used in *Awop v. Lapenmal* [2007] VUIC 2, while the transfer of land as a consequence of a bet was rejected in *Haitong v. Tavulai Community* [2007] VUIC 3 on the grounds that it had not been made in 'a goodwill manner' and was not a 'legitimate' or 'binding' agreement.
78. [2007] VUIC 2.
79. This was integrated into domestic law by the Convention on the Elimination of all forms of Discrimination Against Women by the Ratification Act of Parliament No. 3 of 1995. It is one of the few human rights conventions that has had widespread publicity in Vanuatu.
80. Article 5(1).
81. Thereby distinguishing it, on the facts, from the case of *Noel v. Toto* [1995] VUSC 3, which was referred to. A similar line of reasoning was followed to support a matrilineally based claim in *Haitong v. Tavulai Community* [2007] VUIC 3.
82. *Haitong v. Tavulai Community* [2007] VUIC 3.
83. It also marks a departure from earlier case-law, where it was made clear to the parties that: '*Kot imas mekem iklia long ol patis se ol storian we bae oli talem long Kot blong pruvum se whu nao iraet ona blong graon ia bae kam aot nomo long ol kastom blong yumi long Efate mo Pango. Hemia imin se ol patis oli no save tokbaot loa blong waetman blong pruvum kes blong olgeta. Oli mas tokbaot nomo wanem we kastom italem se olgeta nao oli tru kastom ona long graon ia*' (translated as 'The court must make it clear to all the parties that the stories they narrate to support their claim to the land must derive from the customs of this place. That means that the parties must not talk about or rely on white man's law to support their claim, but only the true custom of this area') (*Kalmatalu v. Wit* [2003] VUICB 3). See similarly *Family Mermer v. Taliban* [2003] VUICB 2.
84. *Tenene v. Kalmarie* [2004] VUICB 1.
85. For example, law students and recent graduates from the University of the South Pacific which has its Law School in Vanuatu.
86. See on this, Mugambwa (2001).
87. See, for example, *Malas v. Tretham Construction Ltd* [1995] VUIC 1.
88. See, for example, *Chief Manua v. Kerry* [2004] VUIC 7.
89. For example, in *Alanson* there was declaration of custom ownership for four of the claimants, but those who were

unsuccessful were entitled to 'have the right to work the land provided that proper arrangements are accommodated in consultation with the declared custom owners, since they have been working the land for generations and made vital developments thereon'.

[90.](#) [2003] VUIC 1.

[91.](#) [2004] VUIC 5.

[92.](#) [2005] VUIC 6.

[93.](#) [2007] VUIC 6.

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NAVIGATING CHANGING LAND USE IN VANUATU

Sue Farran

Northumbria University

Among the least developed nations in the world, Vanuatu had the dubious distinction of being governed by an Anglo-French condominium prior to independence in 1980. Land, much of which had been alienated from customary control during colonial rule, was a key trigger in the political movements that led to independence. Like many Pacific islanders, ni-Vanuatu are "people of place." Land is central to identity, kinship, and, for many, survival. Increasingly, however, land is a commodity that can be converted to cash, primarily through the use of leases, and a growing percentage of land, especially near urban and coastal areas, is being leased, subdivided, or brought under strata-title, sometimes for use and occupancy by ni-Vanuatu but more often for developers, foreign investors, and tourism ventures. In 2006, awareness of the rate of postindependence leasing and associated concerns were brought to the attention of the public by way of a National Land Summit. Resolutions were passed and promises made. To date, little has happened at the formal level. Life (and leasing) goes on. Nevertheless, there is evidence that ni-Vanuatu are learning to navigate the choppy waters of land development in a variety of ways and with different outcomes.

Introduction

THE ARCHIPELAGO OF AROUND EIGHTY ISLANDS that make up the Melanesian Republic of Vanuatu have many languages and many customs, but they have two things in common: notionally, all land belongs to the indigenous people, and land is the primary resource that can be used to engage with the monetary economy. The first of these is a result of the independence Constitution, which, aside from very limited areas of state

land in the municipal areas of Port Vila and Luganville,¹ returned all land to custom owners. The second is a consequence of a lack of other natural exploitable resources, such as magnesium, as in neighboring New Caledonia; gold (as in Fiji) although in very limited quantities; hardwood timber resources, as in the Solomon Islands and Papua New Guinea; or nickel, as in Papua New Guinea. Nor does Vanuatu have the extensive tuna fishing ventures found in places like the Solomon Islands or land suitable for large-scale sugar production, as in Fiji. These two features, in combination, have created a situation of considerable tension between the desire or need to commercially exploit land in various ways and the desire or need to keep land within the customary framework of land tenure. This tension has been aggravated over a number of years by social factors, such as population increase and urban drift;² by political factors: internally by land practices that range from corrupt to merely inefficient and externally by pressures and policies from donor states to "make land work" better and to use land to meet development targets;³ and by legal structures that are ill equipped to deal with contemporary land issues either because there is a mismatch between the laws and the way things are done or because the forums for dispute resolution are ineffective. Consequently, there are today—and indeed have been for some time—parallel systems governing land issues in Vanuatu and some evidence to suggest that various parties are becoming adept at navigating between these, either to achieve certain aims of their own or to frustrate the aims of others.

This paper proposes to sketch the postindependence background to present land issues and then to consider three features that have emerged from recent work undertaken by a project team under the organization of *Jastis blong Evriwan* (Justice for the Poor), which is part of a World Bank program encouraging research activities directed at examining land and natural resource management and access to justice on particular Vanuatu islands. I have been involved in the project as a peer reviewer. The project built on statistical research that I had undertaken—with the assistance of students from the University of the South Pacific, in 2001–2002—and subsequent research in 2006. The aim of the *Jastis* project has been to undertake empirical research to inform a better understanding of the leasing of land currently occurring in Vanuatu that could in turn be used to inform policy adopted to give effect to the Vanuatu Land Sector Framework 2009–2018. Besides undertaking a statistical review and analysis of current land records, the *Jastis* program also engaged in two field projects, one in Tanna and one in Epi, in order to map on the ground through interviews, observation, and analysis of formal records "the way customary groups negotiate and engage in land-lease dealings and the type

and effectiveness of mechanisms and strategies people use to resolve disputes.”⁴ The reports of these projects address a wide range of issues, but the features that this paper focuses on are myths and malpractices in registration, using leases to secure customary title, and doing things with land the ni-Vanuatu way. Approaching the topic from a legal perspective, the paper places the Jastis fieldwork done on the islands of Epi and Tanna within the legislative context, taking into account decisions of the courts, policy papers, and academic comment in order to use the case studies to highlight contemporary practices and issues relating to land and development in Vanuatu and to illustrate the way in which ni-Vanuatu are navigating between customary and introduced land laws.

The Postindependence Background to Present Land Issues

The 1980 independence Constitution of the Republic of Vanuatu restored perpetual title to all land to the indigenous custom owners⁵ and provided that the rules of custom should form the basis for the use and ownership of land. No further indication regarding the nature, extent, or applicability of the rules of custom was given, and none has been forthcoming, although no doubt this was envisaged.⁶ As will be indicated, customary land tenure practice has shown itself to be increasingly adept at using or adapting some of the rules and institutions introduced under “foreign” law. Moreover, the constitutional fiat has not meant that all land is held under customary tenure. Under colonial influence, freehold (and the equivalent in French law) and leasehold were introduced. Although all freehold was abolished at independence, as only indigenous people could have perpetual ownership, leasehold was retained as both an interim measure and to facilitate continued and future investment in land, primarily for agricultural purposes beneficial to the newly independent country. Those settlers who were in occupation of land at the date of independence were required to vacate it—subject to compensation payments—or could enter into fixed-term leases with the custom owners, provided that the latter could establish that they were the successors in title to the original customary owners.⁷ New leases could be entered into either between indigenous people or between indigenous people and nonindigenous people, including noncitizens.

This overnight shift in landholding patterns created several practical problems. First, after a period of colonial settlement dating back to at least the mid-nineteenth century, if not earlier, the original custom owners could not always be ascertained, or their credentials might be challenged. Second, there were a number of potential legal regimes governing leases—French law, English law, and local unwritten practices. A national law was not

passed until 1983 and did not come into force until the following year.⁸ In the interim, some land continued to be occupied by settlers without any formal lease, other land was cultivated or occupied by local people who either had been displaced at some earlier time from their own land by the incursions of settlers or natural disasters or took advantage of land lying idle when some settlers fled following the political upheavals surrounding independence, or it was occupied by those who claimed land to be theirs in custom, sometimes mistakenly or fraudulently. In order to address some of the uncertainty engendered by this transition from colonial settled state to independent, indigenous state, power was vested in the Minister of Lands to manage land where there was a dispute regarding the identity or validity of a custom ownership claim or where customary owners could not be found.⁹ The relevant minister (whose title has changed from time to time) has continued to exercise this power, often in situations far removed from those envisaged in the enabling legislation. In particular, the power has been exercised over land that had never been alienated to foreigners and arguably, therefore, was not covered by the Land Reform Act.

Consequently, since 1980, a parallel system of land tenure has persisted. While approximately 90 percent of the land in Vanuatu is held under customary tenure (although disputes affecting such land are widespread and persistent) and cannot be alienated in perpetuity, it can be leased for a period up to seventy-five years, either to other indigenous people or to nonindigenous people. Once a leasehold is secured over land, the land can be subdivided, developed, and also used as security for mortgage finance. At the end of the lease, the land will in principle revert back to the customary owner, but in practice (although in most cases this remains to be tested), the customary owner may have to compensate for improvements (which they may not be able to afford) or offer to renew the lease.

Within this parallel and plural system of landholding, the land rights of indigenous people are determined by largely unwritten, customary law. This law, as elsewhere in the region, is closely related to social and family organization—to the tracing of lineages and the recounting of histories stretching back to stories of origin.¹⁰ Land is held by one generation for the benefit of the next, and its management has to accommodate a number of different claims and obligations. While individual claims to land are not unknown, often these are contested, and, more usually, while the current management of land may vest in an individual, it is for the benefit of a number of people linked by lineage, marriage, adoption, and affiliation. Leases, however, and other introduced forms of landholding, such as strata-title, can be held by anyone and are premised on the free alienability of

land, the exercise of individual will, and a perception of land as a market-place commodity that can generate income, fetch a price, and be burdened as security for financial loans that in turn might be used to improve or develop the land or be used for other projects, such as the purchase of a vehicle for a taxi or to establish a store, or simply be frittered away.¹¹

While there is no registration of title to customary land—and indeed there have been no attempts to do this—leases over three years do have to be registered. For researchers, this is a boon, as it should, in principle, be possible to get an accurate picture of how much land is under lease. When I first looked into this in order to establish a statistically supported picture of how much land on the island of Efate—excluding land within the municipal boundaries of Port Vila—fell under lease,¹² all the records for the land registry were in hard copy in well-ordered files in an efficiently run office. In the period between my own research and that of Jastis blong Evriwan, the records were boxed up and physically removed to new premises, where they sat waiting to be converted into electronic data using software and computers funded by donor aid in the belief that this modernization would deliver a more efficient and effective service. However, one of the initial aims of the Jastis project was to ascertain the current picture of land leases through the registration process in order to present an overview of the national leasing profile insofar as it can be ascertained from centrally held records. It was hoped that this would give hard currency for informing future land policy. This proved to be extremely challenging. Not only were there conflicting figures for the total number of registered leases, but it was clear that the figures did not represent all leases, as leases under three years do not have to be registered; there is a backlog of leases waiting to be registered; and there are inaccuracies in the information held on registered leases (e.g., duplication of leases, failure to remove canceled leases or merged leases, failure to remove old leases replaced by new ones as a result of boundary changes or subdivisions). There are, moreover, as many as six different government databases: the e-survey database, the Valuation Database, Saperion, the e-registry database, VLAMS, and the Cadastral GIS database.¹³ These databases vary in quality and coverage, with missing data for many of the important variables; for example, Jastis research found that the period of time of the lease was missing for 24 percent of all leases; the year in which a lease was granted was missing in 12 percent, so it would be contentious as to when it expired; in 8 percent an indication of the land area covered by the lease was missing; 6 percent had the class of use to which the land could be put missing; and in nearly half the records, data for rent, whether by way of premiums or annual charges, was missing.

Although the data are incomplete, Jastis has estimated that there were, in 2010, approximately 13,818 active leases,¹⁴ covering an area of 1,258.6 square kilometers, which represents about 10.5 percent of the total land area of Vanuatu. While there may be some debate about the statistics,¹⁵ what is evident is that leasing is increasingly a feature of Vanuatu land use with varying percentages of land being brought under lease from island to island.¹⁶ Although the use of leases can be beneficial to ni-Vanuatu, there are increasing concerns that these benefits are being received by a limited number of local people and that more often the benefits are being reaped by middlemen and overseas investors. The type of negative circumstances that surround leases and to which attention has been drawn through the Resolutions of the National Land Summit 2006 (Tahi 2007), local media, and consultancy reports (Fingleton 2005; Lunnay et al. 2007) are illustrated by case examples recorded by the Jastis field officers, such as secretive lease registration without consultation with all customary interests or the involvement of island council of chiefs; failure to comply with legal requirements for environmental impact assessments prior to granting the lease; failure to pay premiums, review rents, or observe employment or development covenants included in the lease; registration by the Department of Lands without the necessary supporting documents; payments of monies to only a limited number of those entitled to benefit; and mismanagement and squandering of lease monies so as to frustrate any equitable distribution. There have also been allegations of bribes and backhanders to facilitate the negotiation, approval, and registration of the lease; forged documentation; and the deliberate concealment of relevant information.

The Field Studies

Besides seeking to establish a national survey of lease activity, the Jastis program included two field studies, one on the island of Epi and one on Tanna.

Epi is an island just north of the island of Efate, where the capital Port Vila is situated. Although Epi is small, it is within easy reach of Port Vila by both boat and plane and is beginning to attract tourists. It provides a typical case study for leases. Epi has a population of 5,648 people, according to the 2009 national census, who make up just over 1,000 households. It has no urban center, so these households are grouped in scattered villages largely dependent on subsistence farming with a few families involved in tourism. There are twenty registered leases on Epi, which between them make up about 14 percent of the total land area. Most of

these leases (seventeen in total) are on land alienated prior to independence. However, more recent leases include subdivisions created over a surrendered preindependence lease and a large, purportedly agricultural lease of 5,343 hectares granted in 2007 representing a land area of 12 percent of the island.

Tanna is south of Efate and much larger than Epi with a land area of 570.70 hectares, of which about 2 percent is under lease. There were sixty-four registered leases on Tanna, but five of these were discounted, having been replaced or superseded by new leases, or having expired or been canceled, and a further ten were found to be inactive. In the 2009 census, it was estimated that the population was 28,799, making up 5,153 households. This marks an 11 percent population increase since the last census in 1999, and there is some pressure on land in east Tanna, necessitating relocation for gardening and access to timber. Volcanic ash fallout from the active Yasur volcano has aggravated the need for land resettlement. While there is some urbanization around Lenekal and Isangel, most households are dependent on subsistence agriculture. As in Epi, there is some tourism in Tanna, and the volcano attracts a number of visitors.

Myths and Malpractices in Registration

Under the Land Leases Act 1988 (Cap 163), registration is deemed to confer on the registered leaseholder an indefeasible right, subject only to previously registered interests or a limited number of interests that are deemed to be overriding and that are not on the register (listed in Section 17).¹⁷ Whether the Vanuatu system of lease registration truly amounts to a Torrens system—as is found in New Zealand and in most Australian states, for example—is debatable. It appears to have been assumed to be so in *Ratua Development Ltd v Ndai* (2007), VUCA 23, but in the later case of *Solomon v Turquoise Ltd* (2008), VUSC 64, it was held that “the principle of indefeasibility is not so strongly entrenched in Vanuatu’s Torrens system as elsewhere,” suggesting that in Vanuatu there is a modified Torrens system.¹⁸ However, although as will be seen, security of title may be challenged retrospectively to registration, a person to whom a registered lease is subsequently transferred is protected from any suspect dealings that may have surrounded the original registration (Section 23). This, of course, is a great advantage to the developer who may get in quickly and get out quickly, having acquired the land, established a modest infrastructure of dirt roads, and marked out subdivisions for resale.

While registered title is meant to be indefeasible, it can in fact be challenged, and part 15 of the Land Leases Act provided for rectification

of the register, either by the registrar or, more important, the court. Section 100 states the following:

1. Subject to subsection (2) the Court may order rectification of the register by directing that *any registration be canceled or amended* where it is so empowered by this Act or where it is satisfied that *any registration has been obtained, made or omitted by fraud or mistake.*
2. *The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.* (emphasis added)

In the case of *Naflak Teufi Ltd & Kalman Kiri Manlangai* (2005), VUCA 15, the Court of Appeal of Vanuatu held that the object of the above section was "to ensure that the land register and the process leading up to the registration of any instrument or interest is free of any mistakes, fraud or possible fraudulent activities. In other words, its purpose is to secure the integrity of the Register, and the internal processes culminating in registration." This raises two legal issues: first, does a claimant have standing to challenge the register, which is usually a case grounded in customary law, and, second, will the court order rectification, which is determined by the interpretation of the legislation, not customary law. This presents two challenges for the customary owner who has been excluded from lease negotiations in the first place, and overcoming the first obstacle will not necessarily lead to success at the second.

In meeting the first, although *locus standi*, or the right to appear before the court and make a claim, may be supported by reference to customary law, the case law suggests that a number of noncustomary arguments may also be put forward. For example, in *Ifira Trustees v Kalsakau* (2008), VUSC 25, the claimants argued that the custom owners of the land had decided to vest the legal ownership of the disputed land in Ifira Trustees Limited, who were to hold the land beneficially for all the members of their community. The truth of this claim was not challenged. However, there was a question of whether using the corporate trust was compatible with the constitutional provisions that stated that all land was to be held under customary tenure (articles 71–73). The trustees argued that "there is no inconsistency between the declaration (of trust) and the said articles because: 1. The said lands belong beneficially to the respective indigenous custom owners and their descendants; 2. They have applied their own rules

of custom in deciding the basis of ownership and use of the said land. 3. They have adopted and therefore recognise the concept of trust as being 'a recognised system of land tenure' for the purpose of this custom in regard to Article 73 of the Constitution." The court accepted the *locus standi* of the claimants despite the fact that (1) the trust and therefore trustees of a trust are introduced legal concepts and (2) Section 1 of Land Leases Act refers to proprietor of a lease and defines this as "in relation to a registered lease the person named in the register as proprietor thereof . . ." In *Bouchard v Director of Lands Records* (2003), VUSC 6, it was pointed out that "the Act in various sections speaks of a 'person.'" Strictly speaking, a trust is not a person, nor is the office of trustee—although it may be undertaken by a person. However, in the Ifira case, which concerned people and lands within the vicinity of the capital Port Vila, there is a trust corporation that may be deemed to be a "legal person." Nevertheless, it could be argued that such an introduced or foreign concept could never be part of the customary law envisaged under the Constitution in respect of customary land.

In *Kalotiti v Kaltapang* (2007), VUCA 25, the Court of Appeal accepted the ruling by a New Hebrides Native Court in 1972 that the claimants were custom owners and therefore entitled to raise a challenge to the registration of a lease even though it was not clear that the 1972 preindependence case had been decided according to custom or that preindependence court decisions were intended to remain of force and effect at independence, as no reference is made to this in the constitutional provisions for the transitional legal regime (found in article 95).¹⁹ However, a prior court ruling may be useful evidence to achieve rectification and was successfully used in *Kalou v Traverso* (2003), VUSC 59 (and subsequently upheld by the Court of Appeal in *Traverso v Kolou* [sic] [2003], VUCA 18), where a lease of valuable coastal development land granted by the Minister of Lands to the defendant was found to have deliberately sidestepped an Island Court decision that the claimant was the customary owner of the land in question, and the court was satisfied that the lease had been obtained by dishonesty or by fraud and that rectification should take the form of cancellation of the lease. Although in this case the minister himself was not found culpable, there have been cases where this implication has been made.²⁰ For example, in the case of *Solomon v Turquoise* (2008), VUSC 64, the minister approved a lease that was then registered, knowing that there was a dispute affecting the land. The court, in a decision that was upheld on appeal (*Turquoise v Kalsuak* [2008], VUCA 22), set aside the registered lease on the grounds that the leaseholder was not yet in possession (see my emphasis of Section 100 above). According to the ruling in the Appeal Court

decision in the *Turquoise* case, the date at which possession will be assessed is “the day when the issue of fraud or mistake was first asserted against the registration”—evidence of which will be strengthened by the registration of a caution—“or, if not then, at the latest when proceedings were issued claiming rectification” (2008, VUCA 22: 41). There is therefore the opportunity to challenge registration of lease where the leasee is tardy in taking up possession—as may be the case where land is acquired for speculative investment or development is delayed.

In the *Turquoise* case, the Supreme Court held that the possibility of retrospective cancellation of registration, provided in the legislation, is deliberate and has been included in order “to accommodate Vanuatu’s circumstances” (Judge Tuohy 2008, 67). In particular, if there is a title dispute going through the Customary Lands Tribunal system, which has jurisdiction to hear customary land claims, then

if rectification is not ordered and the custom ownership of (the claimant) is later upheld . . . he will have lost for his own lifetime and probably the lifetime of his children, the possession of his traditional land, completely against his wishes. The land may in all likelihood have already been subdivided and homes or other buildings constructed and occupied. That would be a very unfortunate result. (Tuohy 2008, 72)

Consequently, where the minister makes a “mistake” as to his or her power to grant a lease—for example, by ignoring the views of custom owners, accepting a bribe, taking into account matters that should not be taken into account, or ignoring those matters that should be taken into account—indefeasibility of title is at risk, provided that a causal connection can be made between the minister’s “mistake” and the registration. This was elaborated on in the case of *Roqara v Takau* (2005), VUCA 5, where it was explained that while an Island Court order is binding only on the parties to it and not on the minister, if a minister registers a lease concerning land over which there is an order restraining the disputed customary owners from dealing with it, then this is a highly relevant fact that the minister would be expected to take into account.²¹ If he does not or if the order is not brought to his attention, then that mistake could have led to the registration being made and would be grounds for rectification once the mistake came to light.

Therefore, while purchasers may believe that they have indefeasibility of title, in fact in Vanuatu it is possible to cancel or amend the registration

of a lease if either the leaseholder is not in actual or constructive possession—which requires more than a mere right to come into possession, which is implied in every lease—or there is fraud or a mistake that has been instrumental in the registration going ahead.

Increasingly, it would seem that registration itself is being challenged by those whose claims to customary land pre-date any registration. Often these are triggered when the monetary value of land becomes apparent in the course of lease negotiations or thereafter. The system of registration is being used, therefore, not only to secure leases for lessees—which is its intended purpose—but also to indirectly assert customary claims against lessees and often those who granted the lease. This may be done at the time of registration but equally may be done some time afterward.²²

Using Leases to Secure Customary Title

The registration of leases does not provide for the registration of the interests of the custom owners of the land leased. Indeed, it was pointed out in the case of *Ratua Development Ltd v Ndai* (2007), VUCA 23, that

there is indeed no specific place for the identification of lessors in the register. Although we assume that their names are recorded as part of the brief description of the lease in the property section of the register, it is clear that the property section is intended to record and identify the details of the lease not the lessors. It follows that the Land Leases Register does not purport to and does not declare the custom ownership of the land subject to a registered lease. There is no Torrens system in respect of those to whom the land belongs, namely the custom owners. (paragraph 26)

So, registration of leases does not directly provide any register of customary landownership. Indeed, many ni-Vanuatu regard proposals for the registration of land with considerable suspicion, believing that this may be a means whereby the government (or foreigners approved by the government) will take away their land. However, some ni-Vanuatu see registration of leases as advantageous. In both Epi and Tanna, researchers found that in some cases registration was viewed in a positive light because it afforded an unchallengeable right to the land and thereby conferred a security of title that was not available under customary tenure. If a lease is to be utilized to secure customary claims to land, not only does a lease have to be created over it, but it has to be in favor of the customary owners, in which case the

lessors and lessees may be one and the same parties or at least represent the same family interests. The use of registration in this way can apply to formerly alienated land where continuing disputes since independence have meant that registration has been delayed or be used to secure new leases (over nonalienated land) where there are ongoing customary disputes.

An example of the first is illustrated by one of the Epi cases where alienated land was returned to custom owners at independence, but some twenty years afterward a dispute arose between the custom owners and others claiming the land. Although the local council of chiefs ruled in favor of the custom owners, the aggrieved other party went to Port Vila and registered a lease over the land. Apparently, the registered leaseholder hopes to secure a mortgage over the land to develop it for tourism and to subdivide the remaining land. Here the use of registration to attempt to silence or bring to an end a long dispute suggests that frustrated custom owners wanting to develop their land may see registration as a useful tool in their endeavors to do so. In this case, the family registering the lease were historically incomers allowed to use a small portion of land that over time grew to 115 hectares. The registered lease, which was between members of the family as, respectively, lessors and lessee, was to secure title over this enlarged area against those claiming to be original settlers of the land. The use of leases to secure customary land is not new. The Epi research also includes a case where although local chiefs accepted that the family occupying the land were the custom owners at independence, a lease was nevertheless registered in their favor in 1984, and the land peacefully occupied under a lease by these recognized custom owners until 1999, when disputes over entitlement to trochus shells arose because of nonpayment of rent. Following court hearings in 2008, the lessees became registered as the lessors, thereby merging the identity of the two parties among different family members. In principle, this would mean that there was no need for a lease, but here the family in question was not originally indigenous but had married into the indigenous community and over a number of generations been assimilated into it. The use of the registered lease helped to secure land rights for them in what might otherwise have been a continuing precarious situation.

In the second case, where a lease is used to secure nonalienated land, there are two ways in which a lease may be achieved. The first is where the Minister of Lands intervenes and uses his power under the Land Reform Act, possibly wrongly, to act as lessor. This technique is illustrated by an Epi case where a long-running dispute between customary land claimants led to the involvement of the minister of lands becoming lessor

at the instigation of some but not all of the disputing parties. The minister then exercised his power under the Land Reform Act to grant a lease to some of the disputants despite the fact that the Supreme Court had already made a ruling regarding ownership of the land so that, in principle, there was no need for the minister to exercise his powers under the Land Reform Act. In Tanna, four leases had been entered into in this way in the course of the past few years (2007–2009). In all of them, there were disputes affecting the land, and the lessees were custom owners involved in the dispute, so the registered lease afforded them security while the lengthy and often drawn-out court procedures went on.²³

The Court of Appeal of Vanuatu has indicated that where the Minister uses his powers in this way over land that was not alienated prior to independence, this is an abuse of the powers conferred under the Constitution. Indeed, the Resolutions of the National Land Summit called for the abolition of such ministerial powers. Nevertheless, it appears that custom owners see some merit in using the minister's powers to their advantage. It may also mean that regardless of any dispute resolution, the lessees are in occupation of the land and that further measures will have to be taken to enforce any court judgment that goes against them, thereby protracting the likely litigation. However, the creation of lease over land to which the lessees already have a customary albeit possibly disputed claim means in principle that they may be subject to the payment of rent and/or a premium. Indeed, if the Minister of Lands is the lessor, he is obliged to collect rent and hold it on trust for the eventually determined custom owners. In only two of the Tanna cases was such rent was being paid, and in other cases where the minister has exercised his power, there has been concern that monies received were not being properly accounted for or could not be extracted once it was clear, as a result of a court order, who was beneficially entitled.

The second way in which a lease may be used in respect of nonalienated customary land is where a lease is negotiated between members of the same family, often for no payment of premium and no or very little rent—five of the seven leases falling under this heading in Tanna generated no rent. The advantage of this is that the lease not only confers security of title but also transforms the land from a nonmortgageable asset to a mortgageable one, thereby allowing the custom owners to secure finance for development or other entrepreneurial activity. It is also one way in which women can secure an interest in land in their own name or as a co-lessee with other members of the family, although examples of this happening in the Epi and Tanna research are few. A lease in these circumstances can be advantageous to family members; for example, where they are lessees in

occupation of land required by the government, they may be entitled to compensation (as demonstrated by at least one lease on Tanna), but it may equally be disastrous. Where monies are secured against the land default can mean repossession by the lender. If the family members fall out, there is always the possibility that the lessees will sublease or assign the lease to nonfamily members, often foreign investors, as demonstrated in four of the five tourist leases on Tanna.

Doing Things with Land the ni-Vanuatu Way

In Vanuatu, land can be developed for two income generating purposes: tourism or agriculture. On both Epi and Tanna, there was evidence of agricultural projects. In Epi, postindependence agricultural projects appeared to have failed. Although there were promises of new employment opportunities associated with the granting of a large agricultural lease, these had yet to materialize, and employment opportunities under older agricultural leases arising from preindependence titles had diminished because of land becoming neglected, falling copra prices, and failure to develop land as promised.

In Tanna, a coffee agribusiness had been established shortly after independence by the Commonwealth Development Corporation on leased land of 466.01 hectares. At first, coffee was grown by the Tanna Coffee Development Corporation on the leased land, but over time centralized coffee growing using paid labor has given way to smallholding coffee growing whereby landowners have either taken over plots of land under the lease or grow coffee on their own land that they sell to the corporation. Management of the leased land has passed to the customary owners, the lessors, while the role of the corporation has been to assist local growers and purchase their beans. Although not the original purpose of the lease, this arrangement seems to have worked well, and there has been support for retaining the land under the original lease in order to provide secure land for future generations within the community. However, in 2010, new coffee buyers entered the market, providing competition for the Tanna Coffee Development Corporation. Growers now have a choice as to where to sell their beans. Moreover, while management of the land has passed into the hands of custom owners through the formation of a cooperative, there is dissatisfaction among some that monies are not being appropriately handled and that the executive of the cooperative is planning to lease the land or some of it to other lessees. This is causing disquiet, as, should they do so, this would mean that there was no longer security of (leased) land available for coffee growing for future generations.

Although limited, these examples of agribusiness leases suggest that unless local land groups are engaged in the cultivation/agricultural processes and see a fair economic return for their efforts, there are likely to be failures and/or disputes. However, as the possibility of returns increases—either through commodity competition or the possibility of land use change, such as agriculture for tourism or subdivision, or the possibility of participating in some form of compensation payout, such as for environmental damage—the whole edifice is in danger of collapsing, leaving those affected without security of land tenure either in custom or under leasing arrangements.

Conclusion

In this paper, I have tried to place the contemporary picture of land issues within its historical background, focusing especially on the legal framework that has emerged to inform present difficulties. A plurality of laws can have positive benefits because it allows maneuverability; it can also lead to lack of cohesion, confusion, and certainty. It also encourages “forum shopping,” for example, going from one court to another or dipping in and out of the formal system to engage with the informal system. While Vanuatu may be fortunate compared to some of its neighbors that the Constitution declared that “all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants” (Section 73), it is perhaps unfortunate that more has not been done to ensure the security of this principle. Similarly, although the Constitution states that “the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu” (Section 74), clearly this is not the case, at least as far as use/occupation is concerned. Noncustomary forms of land tenure are unlikely to disappear while they are supported by national land policies (often shaped by donor advisers) and find favor among many local people.

The future picture of land in Vanuatu is pretty grim. Most leases granted in recent years have been for the maximum period of seventy-five years. The population is growing rapidly with a large percentage under the age of twenty-five. Opportunities for outward migration are very limited. Some people are already landless insofar as they have leased out their land and cannot use or occupy it for the foreseeable future. Others are landless because they have lived in the urban areas for so long that they have lost their claim to lands in their islands and have little wish to return to subsistence farming in rural area. Others have land to use and occupy, but their right to do so is precarious either because they are incomers (*mankam*),

even if they have been there for several generations, or because they are squatters living in overcrowded and badly serviced settlements in and around the urban areas. Despite assertions to "clean up" corruption or improve land administration, gross mismanagement of power and resources at central and provincial levels continues.²⁴ Dealings with land are also characterised by considerable imbalances of power in transactions between non-indigenous (usually ex-patriate) developers and/or investors and indigenous ni-Vanuatu, and between local people themselves, some of whom have access to lawyers, the machinery of land registration and the benefits of education, while others are poorly educated, lack resources, live in rural areas, and are denied sufficient information to be able to make well-informed decisions regarding their land, as well as being denied access to sufficient funding to develop it under customary tenure.

Nevertheless, despite this gloomy picture, there are grounds for optimism. The natural adaptability of people accustomed to weak central government and to looking to local laws, practices, and forums for determining their daily lives demonstrates a resilience to total disaster and an ability to make something of the present muddle. This is evident in the way that leases are being used to secure, at least in the short term, customary land rights in order to minimize social disruption; in the way that landholders are forming informal trading cooperatives to market produce; and in the way that individuals and groups are prepared to increasingly question and in some cases challenge proposed land commoditization through challenges to leasing either at the outset or at the registration stage. Rather than being passive in the movement to "develop" land, some ni-Vanuatu are beginning to fight back and to take control of the process to make it work for them.

NOTES

1. Probably less than 2 percent of the total land area of 11,880 square kilometers (915 square kilometers) is public land.

2. The population is approximately 221,506 (2006 Census of Agriculture) with an average annual growth rate of 2.6 percent.

3. See, for example, the AusAID publication *Making Land Work 2008* and *Pacific 2020* and comment in Farran (2009).

4. Porter and Nixon (2010, 5). On Tanna see Nixon et al. (2010).

5. Article 74 (apart from relatively small areas of public land located in the two metropolitan areas of Port Vila and Luganville).

6. Section 76 of the Constitution states, "Parliament, after consultation with the National Council of Chiefs, shall provide for the implementation of Articles 73, 74 and 75 in a national land law . . ."
7. Governed by the Alienated Land Act Cap 145, which was not brought in until 1982.
8. Land Leases Act Cap 163.
9. Section 78 of the Constitution and the Land Reform Act 1980, Cap 123, Part 5. See Farran (2003).
10. See Farran (2010).
11. There are cases in the Jastis project that support this.
12. See Farran (2002).
13. The application number comes from e-registry and Saperion; lease type from VLAMS, e-Registry, Saperion, and cadastral GIS; cadastre from e-Survey; lease term from the old valuation database, e-registry, and Saperion; area from e-survey and cadastral GIS; and rent from e-registry (Calculation formulas) and Saperion. These databases exclude strata-titles that are recorded manually and appear not to be linked in to any electronic database.
14. However, Jastis blong Evriwan research into leasing on the island of Tanna found a number of inactive leases that had not been canceled by the Department of Lands. This situation may also apply in other islands, which would mean that there are fewer leases than this.
15. Lunnay et al. (2007), for example, come up with different figures that suggest that by the time of their report in March 2007, 7,070 leases had been registered under the Land Leases Act since 1980, of which 5,392 were leases of public land in urban areas and 1,678 were rural leases, whereas Jastis found that there were 9,444 active leases as of December 2006, 5,361 of which were urban and 4,083 rural.
16. See Porter and Nixon (2010).
17. These, especially if confirmed by a court, may result in the leaseholder finding that subsequent to purchase of the lease, the land is subject to occupation or other rights of others; see *Williams v AHC (Vanuatu) Ltd* (2008), VUCA 16.
18. There are two features of the system that are important. The first is that it is the land as such that is registered, not the person in occupation; the second is that legal title does not pass until registration. This means that if there is no registration or the registration is set aside, the transferee will hold only an equitable interest not a legal one—following introduced common law principles—and any equitable interest is subject to the doctrine of notice; that is, did the transferee know or have reason to suspect that the transaction was flawed in some way, for example, because there was a pending customary dispute affecting the land?

19. The principle has, however, been subsequently upheld in *Kalo v Malsungai* (2008), VUSC 46.
20. There have also been a number of ombudsman's reports on ministerial abuse of power in this regard; see, for example, Improper Granting of Land Lease Title 11. OE22.016 by the Department and Ministry of Lands (1998) VUOM 10; 1998.10 (April 9, 1998).
21. Prior to the establishment of Customary Land Tribunals, it was the Island Courts that had jurisdiction to hear customary land disputes with appeal to the Supreme Court. Because of the backlog of cases, some Island Courts are still hearing land cases, and not all islands have Customary Land Tribunals; see Farran (2008) and Simo and Van Trease (2010).
22. The Limitation Act No. 4 of 1991 places a 20-year limitation on an action to recover a principal sum of money secured by mortgage or other charge on property or to recover proceeds of transfer of any interest in land. However, it is questionable whether this applies where merely rectification is sought.
23. One of the features noted by the research team on Tanna was the high prevalence of recourse to the formal court system rather than customary dispute settlement despite the strong claim of custom on Tanna. See Draft Report Tanna Island Leasing Report November 2010.
24. See, for example, coverage in the *Vanuatu Daily Post*, Kiery Manassah, "Vanuatu Cabinet Minister Cleared of Bribery," August 11, 2008; Radio New Zealand International, January 20, 2011, "Report Alleges Illegal Land Deals in Vanuatu"; and the news release of Transparency International branch in Port Vila, December 14, 2010, "Hard Questions from Transparency Vanuatu," at <http://archives.pireport.org/archive/2010/december/12-15-rl.htm>

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CONCLUSION

Contemporary land issues and reflections on a decade of research

Throughout these publications I have drawn attention to continuity and to change, neither of which has absolute values. Customary land tenure, for example, continued through a colonial past into the post-colonial present, but also changed. Introduced law has continued to apply but has changed into national law and the multiplicity of interests and issues which can affect land have continued but also changed. Apart from the major change brought about by returning all land to the customary owners through constitutional provisions at independence,¹ most of those changes have been slight and incremental, and so it has continued.

Of all the countries encompassed by the research that informed the AusAID publication „Making Land Work’ and the policy discussions that ensued, Vanuatu was the only Pacific island country to immediately follow this up with what purported to be a major land reform policy. Supported by aid funding from Australia and New Zealand, at the end of 2010, the Vanuatu government agreed to a programme of extensive land reforms in Vanuatu. In order to present it as a home grown product despite being managed by an Australia consultancy team and funded by overseas aid,² the project was called the *Mama Graon* project, capitalising on the local idea of land as mother. Although some progress has been made, for example, upskilling members of the lands department has enabled a backlog of lease registrations to be reduced,³ running training workshops on customary lands tribunals for chiefs, initiating some research into the land rights of women and youth,⁴ and embarking on discussions regarding better use and management of the foreshore

¹ Article 74 Vanuatu Constitution.

² The boundaries are further muddled by the fact that the Deputy Director of the Australian consultancy firm, Lands Equity International, is a former Director General of Lands who is also a technical adviser to the Malvatumauri, while in June 2012, the Chief Executive Officer of the Customary Lands Tribunal unit and of the Malvatumauri was the same person. See Jane Joshua „Mama Graon program a package of funds: Nari’ *Vanuatu Daily Post* June 28 2012, 3.

³ Mama Graon: Storian 3 Issue 3 June 2012.

⁴ By creating a „gender focal point’ member of the Mama Graon team. A post which was immediately filled by a man, see above note 3.

under the Foreshore Development Act, the project has been increasingly criticised. In particular there have been concerns about who owns the project – despite the label,⁵ and suspicion that there is a hidden agenda behind the improvements being made to the Lands Department and in particular mechanisms for the registration of land, and that this is being undertaken to facilitate the commoditisation of land.⁶ There is also confusion over the various roles and initiatives of the projects partners: the Malvatumauri National Council of Chiefs,⁷ the Vanuatu Cultural Centre, the Customary Land Tribunal Unit and the Department of Provincial Affairs. When I was in Vanuatu in July 2012, field officers from the Cultural Centre were engaged in what was described as a „mapping exercise’ to map customary land boundaries.⁸ Villages, land owners and island councils had the right to refuse to cooperate or to agree to cooperate and there was considerable disparity across the country with some island councils refusing entry to field officers. By early July 2012 there was considerable bad feeling being stirred up about the Mama Graon project and it was decided that the name would be dropped and henceforward the project would come under an umbrella of programmes linked to the Malvatumauri.⁹ It seems unlikely now that the Mama Graon project will have any immediate positive impact.¹⁰ There continues therefore, to be considerable confusion over land policy. Indeed writing in

⁵ In June 2012, the then Director General of the Ministry of Lands stated unequivocally that the programme which came under the Ministry of Lands belonged to the Republic, despite being funded by Australia and New Zealand, and was integral to the Vanuatu government „sPriority Action Plan, the Land Sector Framework and the 2006 National Land Summit Resolutions. Godwin Ligo, „Mama Graon program belongs to Vanuatu: gov’t’ *Vanuatu Daily Post* 26 June 2012. See also „Alguet apologizes to prime minister for letter about Mama Graon’ *Vanuatu Daily Post*, July 17 2012, 2.

⁶ See open letter addressed to the Prime Minister „National sovereignty under threat’ Jeff Joel Patunvanu, *The Independent* 7 July 2012.

⁷ The involvement of the Malvatumauri is also complicated by the fact that it is involved in a governance programme under the Ministry of Justice, while the Mama Graon project is also funding customary land tribunal training for chiefs – see „Chiefs optimistic to resolve more land disputes at community level’ *Vanuatu Daily Post* July 21 2012, 4.

⁸ Even this was unclear as one source I spoke to assured me that what was being mapped was genealogies not land boundaries, while others suspect that the mapping is to facilitate leasing, while the Director General Ministry of Justice explained that what was being mapped was customary knowledge, but first the boundaries had to be identified, then the right authorities. See note 9.

⁹ Jane Joshua, „„Mama Graon” name to be removed’ *Vanuatu Daily Post* July 11, 2012.

¹⁰ Conversation with AusAID representative in Port Vila, July 2012.

the local paper in June 2012, the former head of state questioned the ability of leaders and policies to assist and control land owners from the ‚massive sale of land everywhere’.¹¹

Similarly land reform seems as far off as ever despite assertions in October 2012 that all land laws would be reviewed,¹² and various promises made by candidates for the national elections, held that month, to address various land issues should they be elected.¹³ Proposals have also been made to reform the land dispute process. The Customary Land Tribunals, which were established under legislation in 2001, have been subject to two reviews, one in 2005,¹⁴ and one in 2011. It has now been recommended that the system be simplified with the number of tiers of customary land tribunals reduced and a new lands division of the Island Courts established. The Council of Ministers was meant to consider the new proposals in July 2012, but with the run up to the October 2012 elections nothing has happened and it seems questionable now whether the Customary Land Disputes Management Act, even in its revised form, will be either tabled before Parliament or put before the Council of Ministers any time in the near future.¹⁵ Consequently the determination of land disputes remains a mixture of informal, local level hearings, Island Courts – where these are established, and customary land tribunals – where these are established.

Corruption at the highest levels, lack of transparency and poor governance also continue to be features of ministerial intervention in land matters.¹⁶ In 2012 the Minister of Lands was involved in two controversial land matters. The first was the intervention in a proposal by the custom owners of land in North Efate to lease the

¹¹ Jean Marie Leye Lenalenu ‚Vanuatu be careful’ *Vanuatu Daily Post* June 21, 2012.

¹² Thompson Marango ‚All land laws to be reviewed’ *Vanuatu Daily Post*, October 4, 2012.

¹³ See for example, Glenda Shing ‚Taiwan intends to res-establish Urban Lands Corporation’ *Vanuatu Daily Post* September 21 2012, and in the same paper, Len Garae ‚Tarosa says Land Act value of toilet paper’ 22 September, 2012.

¹⁴ See Milena Stefanova ‚The price of Tourism: Land alienation in Vanuatu’ *Justice for the Poor*, January 2008, Vol 2 Issue I, Briefing Note 43686.

¹⁵ Private correspondence with Professor D. Patterson 25 October, 2012.

¹⁶ See for example, an article in the *Vanuatu Daily Post*, ‚Yumi Save Stoppem Karapsen’ 24 September 2012, and in the same paper a report by Transparency International (Vanuatu) ‚Dubious Dealings continue, involving government ministers – what will it take to stop this?’

land to themselves as a community so that they could safeguard the future use and management of the land.¹⁷ Aware of the fact that a community per se had no legal standing, the lease was to be taken in the multiple names of family heads, thereby utilising the law in a novel way but in line with some of the inventiveness that I have described in Part Three. While registration was pending, the Minister intervened on the grounds that there were boundary and ownership disputes relating to the land and exercised his powers under the Land Reform Act to grant a lease over the land to a person from a different custom area and group. The rumour is that this lessee is a mere front to an overseas investor/developer. Although the custom owners have been assured that the lease so granted will be revoked, the lawyer acting for the group is less assured.¹⁸ What is ironic about the Minister's intervention at this late stage is that this was the self-same Minister who stated in January 2012:

“Land is given to us to use for economic and social welfare of our people. Whatever development our land is intended for, the control must be with our people - the land owners”.¹⁹

The second matter is the allocation of public land to employees and officials within the Land's Department in the run up to the national elections at the end of October 2012. Vanuatu, like many Pacific island countries is chronically short of state-owned land, with the consequence that when land is needed for public purposes is it expensive and often difficult to acquire. For motives which are not transparent, the then Minister of Lands ordered the Director General of the Lands Department to make public land available to civil servants employed in in the lands department at very favourable terms. While the subsequent Minister of Lands assured the public that the Public Service Commission will look into this matter and that the leases will be cancelled, there is widespread skepticism in the local press that anything will be achieved. However, at the time of writing the Prime Minister has just resigned and a

¹⁷ See Siobhan McDonnell, „Land is the New Gold’ *Vanuatu Daily Post* 19 October 2012 <http://www.dailypost.vu/content/land-new-gold> (24/10/12).

¹⁸ Private interview September 2012, Canberra, Australia.

¹⁹ Godwin Ligo, „Landowners must have control of their land: Minister’ *Vanuatu Daily Post* January 10, 2012.

new care-taker government has been established.²⁰ The new Minister of Lands is the leader of the Land and Justice party so perhaps things will change.²¹

Indeed, it is difficult to estimate looking back over ten years where the benefit of all the aid-funding that has been poured into land orientated initiatives, has gone and what there is to show for it. What does seem to have occurred, however, is a gradual empowerment of indigenous people. This is not always a positive thing. Where there is opportunity some will use this to their own advantage, and those who have access to political influence, to the skills of lawyers, negotiators or financial institutions are likely to take advantage of these, and not necessarily for the long term benefit of custom land owners or in ways which ensure the sustainable use of land. However, there is also a greater awareness of land issues today than there was ten years ago as evidenced in the rhetoric of those seeking election in this year's national elections, in the local press, and in the litigation coming before the courts. It is also evident in the ways in which people are using the legal system to achieved desired outcomes – as indicated in Part Three.

When I started researching land issues in Vanuatu I did so because I saw developments which alarmed me, including land clearing, reef blasting and enclosure. As a newcomer to the county in 1999 I was also soon aware of the disparities in wealth between indigenous and non-indigenous people and between urban and rural dwellers, and the squalor of squatter settlement. I published because I wanted to raise awareness, within Vanuatu and further afield and once I was out of the country realised that my concerns regarding land in Vanuatu would have to be linked to wider themes if I was to have an audience. While it would be nice to think that my research has had a profound influence on land policy in Vanuatu that would be a naïve claim. Although, as has been indicated in various places in this collection, some of my work has been referred to in briefing papers and reports which may inform policy of donor agencies, national agencies or regional thinking, the pace of change has not abated, and many of the concerns which I have expressed remain.

²⁰ As of 23/03/2013.

²¹ Volatility in government and the frequent votes of no confidence and floor crossing of politicians undermine any consistent programme of law review or land reform.

While this has confirmed for me the limits of law as a regulator or determinant of human action it has also demonstrated the importance of ni-Vanuatu themselves, taking control of their own destinies rather than external agencies. For example, in 2000, my empirical research into land leases indicated that there were approximately 1,070 registered leases for land outside the municipal area on the island of Efate, taking up an area which represented around 29% of the island's total land area. When J4P published a summary of its much more extensive national land lease research findings in 2010, there were approximately 13,815 leases, taking up 1,141 square kms. of land, which represents 9.3% of the total land area of the country.²² In Efate leaseholds represented 44% of the total land area, with 43.6% of these leases being on rural land and 69.5% in the urban area. When I mapped leases in 2000 I presented my findings to a local land conference using the symbol of an American doughnut to illustrate the rapid spread of leases along the coastal areas of Efate. The 2010 data indicates that of the 215 kms. of coastline around Efate, 56.5% is under lease. What is particularly noticeable from the J4P data is that not only has subdivision of leased land increased, peaking in 2007/2008, despite the resolutions of the 2006 National Land Summit including the imposition of a moratorium of subdivisions, but that also the number of leases granted by the Minister continues to be a significant percentage of all leases, especially in the rural areas, again despite the National Land Summit Resolutions, and subsequent calls, to curtail the power of the Minister to sign leases.

If these statistics are combined with those of population, currently estimated at 260,493,²³ and an estimated GDP per capita of US\$3,130 for 2012,²⁴ it becomes evident that land issues are likely to become increasingly volatile over the next decade – a trend that is borne out by the increasing number of land cases being heard at every level, as pressure for land increases and the need to raise the GDP to maintain even basic standards of living become the drivers for change.

²² „Leases in Vanuatu: Key Data from World Bank Jastis Blong Evriwan, Vanuatu National Leasing Profile’.

²³ Vanuatu National Statistics Office <http://www.vnso.gov.vu/> (24/10/12).

²⁴ Vanuatu Fact Sheet <http://www.dfat.gov.au/geo/fs/vanu.pdf> (24/10/12).

In an article published in the *Vanuatu Daily Post* on 13th December 2011,²⁵ the writer explained that the term „Vanua’ when used to describe land „encompasses people, the land, their cosmos and nature’. He went on to explain that in his indigenous language (and there are over one hundred different indigenous languages in Vanuatu) when used traditionally, the words used to refer to land give it a cultural and theological significance and highlight the „belongingness’ of people to place, rather than land belonging to people. However he also pointed out that some people are reversing the component parts of the language so as to prioritise ownership of land. He argued that this linguistic contortion flies in the face of the social patterns of kinship, marriage and inheritance which characterise a particular society. In order to maintain a situation in which „a family can make a living and live in peace with its extended families, neighbour and its community land must be ...”our place”, instead of “our land”.’

The concerns expressed in this press article confirm, although from a different perspective, the conclusions I have reached through the research reflected in these publications. For me the research journey has been one of discovery, despair, frustration and optimism. I chose the title for this collection to capture the complexities which I encountered, the interrelatedness of things I considered and the boundlessness of many of the issues raised. While I continue to be passionate about land issues in Vanuatu and elsewhere in the Pacific,²⁶ and am currently engaged in a proposal to collate, edit and contribute to a monograph on Land, Laws and Customs in Vanuatu,²⁷ looking at land through a Pacific lens has made me reevaluate what land is and means in my own domestic legal context and to look at contemporary interactions with land in a new way.²⁸ It has also led me to investigate other forms of

²⁵ Winston Terre „Reconnect to your land before you lose it’ *Vanuatu Daily Post* December 13, 2011 <http://www.dailypost.vu/content/reconnect-your-land-you-lose-it> (24/10/12).

²⁶ I have recently, for example, completed co-editing and co-authoring a collection of chapters on *Land Systems in the Pacific*, which is a collaborative work involving twenty-two Pacific authors. This is currently with USP Press.

²⁷ The aim is to bring together strands of my work with the field studies of Pacific island students studying Customary Land Law at the University of the South Pacific. The proposal has been submitted to UQPress (University of Queensland) Australia.

²⁸ Evidenced for example, in S. Farran, „Earth under the Nails: the Extraordinary Return to the Land’ in Hopkins, N. (ed) *Modern Studies in Property Law*, Hart Publication, Oxford (forthcoming 2013), and „A bundle of sticks in my garden’

property in the Pacific where many of the issues and challenges encountered in respect of land are also met, notably in the field of intellectual property, and to apply what I have learned about land, laws and development to the increasingly complex issues surrounding copyright, patents and trademarks when applied to forms of cultural expression and indigenous traditional knowledge and practice.²⁹ My own learning journey and contribution to knowledge, therefore continues, and the publications collected together here are steps along the way.

conference paper, Gardens of Justice, Critical Legal Studies Conference, Stockholm, Sweden, 14-16 September 2012.

²⁹ See for example, M. Forsyth and S. Farran, „Intellectual Property and Food Security in Least Developed Countries’ (2013) 34 (3) *Third World Quarterly* 521-538 and a three year intellectual property in the Pacific project I am involved in <http://www.ippacificislands.org/>. This has given rise to a collection of papers by a wide range of contributors which I have recently edited and submitted to the *Pacific Studies* journal, Brigham Young University, Hawaii.

APPENDIX ONE

List of citations

The publications referred to in this collection have been cited as follows:

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